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In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006
(202) 736-8000

JOSEPH P. MAZUREK
Attorney General
CLAY R. SMITH
Solicitor
HARLEY R. HARRIS*
Assistant Attorney General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Does an Indian tribe have inherent regulatory authority over a State and its local governments with respect to discharges into streams and other bodies of water from fee-owned land within the exterior boundaries of the tribe's reservation?

PARTIES

In addition to the parties listed in the caption, several irrigation districts organized under Montana law, along with several individual farmers and ranchers,[1] had sought to intervene at the district court level under Fed. R. Civ. P. 24(a) and (b). The district court denied their motion to intervene (Pet. at 41a), and the Court of Appeals affirmed. Pet. at 15a.

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[1] The irrigation districts are the Flathead Joint Board of Control, the Mission Irrigation District, the Jocko Valley Irrigation District, and the Flathead Irrigation District; and the individual farmers and ranchers are Ross Middlemist, Wayne Maughn, William Slack, and Glenn Murphy.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT	2
I. STATUTORY AND REGULATORY BACKGROUND	4
II. PROCEEDINGS BELOW	8
A. Administrative Proceedings	8
B. Judicial Review of EPA's Decision	9
REASONS FOR GRANTING THE PETITION	10
I. THE COURT OF APPEALS' APPLICATION OF THE SECOND *MONTANA* EXCEPTION CANNOT BE RECONCILED WITH *STRATE* AND PRESENTS AN IMPORTANT FEDERAL QUESTION CONCERNING THE SCOPE OF THAT EXCEPTION	10
II. THE COURT OF APPEALS' DECISION HAS BROAD SIGNIFICANCE NOT ONLY WITH RESPECT TO FUTURE APPLICATION OF THE ACT'S TAS PROVISION BUT ALSO IN OTHER SITUATIONS WHERE THE SECOND *MONTANA* EXCEPTION IS RELIED UPON AS A BASIS FOR THE EXERCISE OF INHERENT TRIBAL AUTHORITY OVER NONMEMBERS	20
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

Arkansas v. Oklahoma, 503 U.S. 91 (1991) 18

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 19

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989) ..... *passim*

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 18

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) 10

Confederated Salish and Kootenai Tribes v. United States, 437 F.2d 458 (Ct. Cl. 1971) 2

Duro v. Reina, 495 U.S. 676 (1990) 18

Fisher v. District Court, 424 U.S. 382 (1976) 15

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 3

Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) 15

Montana v. United States, 450 U.S. 544 (1981) .... *passim*

Narragansett Indian Tribe v. Narragansett Electric Co., 89 F.3d 908 (1st Cir. 1996) 17

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 19

New York v. United States, 505 U.S. 144 (1992) 19

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 18

TABLE OF AUTHORITIES – Continued

Page

PUD No. 1 v. Washington Department of Ecology, 511 U.S. 700 (1994) 9

South Dakota v. Bourland, 508 U.S. 679 (1993) 14

Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) .. *passim*

Thomas v. Gay, 169 U.S. 264 (1898) 15

Williams v. Lee, 358 U.S. 217 (1959) 15

FEDERAL MATERIALS

Code of Federal Regulations

40 C.F.R. § 131.8 (1997) 2, 5

40 C.F.R. § 131.8(c)(3) (1997) 8

Federal Rules of Civil Procedure

Rule 24(a) ii

Rule 24(b) ii

Session Laws

Act of Mar. 13, 1859, 12 Stat. 975 2

Act of Apr. 23, 1904, 33 Stat. 302 2

Pub. L. No. 100-4, 101 Stat. 76 4

Pub. L. No. 100-581, 102 Stat. 2940 4

TABLE OF AUTHORITIES – Continued

Page

United States Code

Tit. 28 § 1254(1) 1

Tit. 33 §§ 1251-1387 (1997) 2, 3

Tit. 33 § 1256 20

Tit. 33 § 1313 ..... 2, 5, 8

Tit. 33 § 1313(c)(4) 18, 19

Tit. 33 § 1319(b) 18

Tit. 33 § 1319(e) 18

Tit. 33 § 1319(g) 18

Tit. 33 § 1341 9

Tit. 33 § 1341(a)(1) 3

Tit. 33 § 1342 3

Tit. 33 § 1342(a) 18

Tit. 33 § 1370 ..... 2, 17

Tit. 33 § 1377 ..... 2, 4

Tit. 33 § 1377(e)(2) 4, 5

Tit. 42 §§ 300j-11 20

MONTANA MATERIALS

Montana Code Annotated

§§ 75-5-101 to -1122 (1997) 3

§ 75-5-103(23) 17

§§ 75-5-301 to -317 17

TABLE OF AUTHORITIES – Continued

Page

§§ 75-5-401 to -405 17

§§ 75-5-601 to -641 18

§ 75-5-605(2) 3

OTHER AUTHORITIES

Final Rule, *Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations*, 56 Fed. Reg. 64,876 (1991) 5

Final Rule, *Indian Tribes; Eligibility for Program Authorization*, 59 Fed. Reg. 64,339 (Dec. 14, 1994) 4

Proposed Rule, *Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations*, 54 Fed. Reg. 39,098 (Sept. 22, 1989) 5

EPA Treatment of Tribes in The Same Manner as States/Program Approval Matrix (March 1998) 20

L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809 (1996) 14

PETITION FOR WRIT OF CERTIORARI

Petitioners State of Montana; Lake County, Montana; City of Ronan, Montana; and Town of Hot Springs, Montana, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 137 F.3d 1135 (9th Cir. 1998) and is reproduced in the Appendix commencing at Pet. 1a. The opinion of the District Court is reported at 941 F. Supp. 945 (D. Mont. 1996) and is reproduced commencing at Pet. 16a. The decision of respondent United States Environmental Protection Agency at issue herein is not reported and is reproduced commencing at Pet. 50a.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The petition presents a question of federal common law which arises in the context of the following statutory and regulatory provisions:

1. Clean Water Act of 1972, as amended, 33 U.S.C. §§ 1251-1387 (1997); 33 U.S.C. §§ 1313, 1370, and 1377 are reproduced at Pet. 118a, 129a, and 130a.

2. Water Quality Standards: Requirements for Indian Tribes to Administer a Water Quality Standards Program, 40 C.F.R. § 131.8 (1997), reproduced at Pet. 113a.

STATEMENT

While this case arises on the Flathead Indian Reservation ("Reservation") in Montana, it more generally calls upon this Court to again address the consequences of the legal and historical events which have shaped modern Indian country. Congress created the Reservation when it ratified the 1855 Treaty of Hellgate. Act of Mar. 13, 1859, 12 Stat. 975. As it had with many other Indian reservations, Congress later "authorized allotments in severalty of Flathead Reservation land to members of the Tribes." Act of Apr. 23, 1904, 33 Stat. 302; *see generally Confederated Salish and Kootenai Tribes v. United States*, 437 F.2d 458, 460-62 (Ct. Cl. 1971). After reservation lands had been allotted to tribal members, Congress authorized nonmembers to enter the Reservation and acquire fee title to land under the "general provisions of the homestead, mineral, and town-site laws of the United States." 33 Stat. 303.

As a result of these policies and other historical trends, non-Indians now comprise over three-fourths of the Reservation's population. A.R., Vol. I, tab. 4 at 13-14; *see also* 1990 Census of Population; General Population Characteristics; Montana (Table 13). Similarly, of the 1.2

million acres of land within the original Reservation, slightly more than 530,000 acres are now held in fee by persons who are not tribal members or by state and state governmental entities, including Petitioners. A.R., Vol. I, tab. 4 at 2; *see also Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 466 (1976).

Petitioners conduct governmental activities within the Flathead Indian Reservation that are subject to regulation under the Clean Water Act of 1972, 33 U.S.C. §§ 1251-1387 (1997), and its state law counterpart, the Montana Water Quality Act. Mont. Code Ann. §§ 75-5-101 to -1122 (1997). The State of Montana operates a research facility that discharges treated effluent into Flathead Lake, while Lake County, Polson, and Ronan operate municipal wastewater treatment plants that discharge treated effluent into several other streams or bodies of water within the Reservation. Pet. 19a-20a. Lawful operation of each facility requires issuance of a National Pollution Discharge Elimination System ("NPDES") permit under 33 U.S.C. § 1342, along with a similar permit under Montana law. Mont. Code Ann. § 75-5-605(2). Prior to this controversy respondent United States Environmental Protection Agency ("EPA") did not require Petitioners to secure an NPDES permit but instead deemed state-issued permits as constituting compliance with the Act.

A condition precedent to issuance of a NPDES permit is certification from the involved State that the proposed discharge complies with the requirements of the Clean Water Act and, if more stringent than federal standards, the requirements of state law. 33 U.S.C. § 1341(a)(1). The issue here is whether EPA properly determined that respondent Confederated Salish and Kootenai Tribes have

inherent regulatory authority over Petitioners' activities related to the discharges and thus may be deemed a "State," thereby requiring certification by the Tribes.

I. STATUTORY AND REGULATORY BACKGROUND

In 1987 Congress amended the Clean Water Act to allow Indian tribes to be "treated as a State" ("TAS")[2] for various purposes. Pub. L. No. 100-4, tit. V, § 506, 101 Stat. 76, *amended* Pub. L. No. 100-581, tit. II, § 207, 102 Stat. 2940, *codified at* 33 U.S.C. § 1377. That amendment, § 518 of the Act (33 U.S.C. § 1377) (Pet. 132a), provides in relevant part:

> The Administrator is authorized to treat an Indian tribe as a State . . . to the degree necessary to carry out the objectives of this section, but only if –
>
> . . . .
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust

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[2] EPA has discontinued the use of the terms "treated as a State" or "treatment as a State" (Final Rule, *Indian Tribes; Eligibility for Program Authorization*, 59 Fed. Reg. 64,339 (Dec. 14, 1994)), opting instead to use the term "treatment in the same manner as a State." *Id.* at 64,343 (amending 40 C.F.R. § 124.2). The abbreviation "TAS" used in the text is inclusive of all of the various labels used to describe instances in which tribes are **authorized** under the Act to be deemed a State.

> restriction on alienation, or otherwise within the borders of an Indian reservation.

33 U.S.C. § 1377(e)(2). In December 1991, EPA issued final regulations concerning the standards for determining tribal requests for authority to promulgate water quality standards pursuant to § 303 of the Act, 33 U.S.C. § 1313. Final Rule, *Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations*, 56 Fed. Reg. 64,876, 64,877-880 (1991), *codified at* 40 C.F.R. § 131.8 (1997) ("Final Rule") (Pet. 92a, 113a). The Final Rule contained a preamble addressing several of the issues that had been raised with respect to the proposed water quality standards rule (Proposed Rule, *Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations*, 54 Fed. Reg. 39,098 (Sept. 22, 1989)) including the question of how § 518 was to be interpreted and applied consistent with federal common law defining the inherent regulatory authority of Indian tribes. Pet. 96a-106a.

EPA first rejected the argument that § 518 constituted an express delegation of federal power to Indian tribes, concluding that "Congress only manifested an intent to authorize EPA to treat Indians as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law." Pet. 111a. This approach, EPA explained, "will best effectuate the overall purposes of the [Act]". *Id.* According to EPA the scope of tribal authority for purposes of § 518 was to be determined by reference to federal common law principles, most specifically those articulated in *Montana v. United States*, 450 U.S. 544 (1981), and later decisions of this Court addressing the same. Pet. 111a.

EPA then went on to formulate an "interim operating rule" that recognizes inherent tribal authority over nonmembers on fee lands in virtually all instances. Pet. 101. The operating rule is based wholly on the EPA's interpretation of the second exception to *Montana's* bedrock "general rule that, absent a different Congressional direction, Indian tribes *lack* civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1409 (1997) (emphasis supplied). In articulating the second exception, the *Montana* Court explained that

> [a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566. In explaining how it interpreted that exception, EPA first noted that in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), "several justices argued that for a tribe to have a 'protectible interest' in an activity [for purposes of the second *Montana* exception], the activity's effect should be 'demonstrably serious.' " Pet. 100a. Accordingly, EPA concluded that the "prudent" approach would be to "require a showing that the potential impacts of regulated activities on the tribe are serious and substantial." *Id.*

EPA's ensuing application of its "serious and substantial" standard was premised on its conclusion that "there are substantial factual and legal reasons to assume that Tribes *ordinarily* have the legal authority to regulate

water quality within a reservation." Pet. 99a-100a (emphasis supplied). As EPA then explained, there were two such "reasons." The first is that impacts to water quality cannot be regulated efficiently along political boundaries. Pet. 102a-103a. The second is that the Clean Water Act itself constitutes a "legislative determination that activities which affect surface water and critical water quality habitat may have serious and substantial impacts." Pet. 102a.

In light of these "generalized findings," EPA formulated an operating rule which required applicant tribes to make

> a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe.

Pet. 105a. In remarkable understatement, EPA explained that "tribes will usually be able to meet the . . . operating rule." Pet. 101a. Once an applicant tribe has met this minimal pleading requirement

> EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality . . . *presume* that there has been an adequate showing of tribal jurisdiction

> of fee lands, unless an appropriate governmental entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.

Pet. 106a (emphasis supplied). EPA did not explain what showing is required to demonstrate a lack of tribal jurisdiction. The practical effect, however, of EPA's operating rule is to establish a presumption of inherent tribal regulatory authority over nonmember activity on non-Indian lands. *See* Pet. at 8a.

II. PROCEEDINGS BELOW

A. Administrative Proceedings

In April 1992 the Tribes applied for TAS status under § 303 of the Act (33 U.S.C. § 1313) with respect to all surface waters within the Flathead Reservation. A.R., Vol. I, tab 3. Petitioners filed comments in accordance with 40 C.F.R. § 131.8(c)(3). A.R., Vol. II, tab 21. In those comments Petitioners opposed TAS status to the extent it would recognize the existence of the Tribes' inherent authority over their activities on fee lands. *Id.*[3]

In February 1995 EPA approved the Tribes' application to administer a water quality standards program applicable to all lands and surface waters within the Reservation. Pet. 50a, 62a-68a. As a consequence of EPA's decision, the Tribes were entitled to submit, and thereafter did submit successfully, their water quality standards

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[3] Petitioners have not contested the EPA decision insofar as it accords the Tribes TAS status with respect to tribal, trust, and member-owned lands within the Reservation.

to EPA for approval under § 303 of the Act, and are entitled to exercise the certification authority granted under § 401 of the Act, 33 U.S.C. § 1341. Pet. 50a; *see generally PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 704-08 (1994).

Applying its Final Rule's analysis, EPA concluded that the Tribes possess inherent authority over nonmembers on fee lands throughout the Reservation for the purposes of setting water quality standards. Pet. 68a. In so holding, EPA declined to hold an evidentiary hearing relative to the Tribes' factual submissions. Pet. 63a-64a. In support of its "generalized finding" that nonmember activity can affect the Tribes' interests, EPA also cited a list of specific instances of alleged nonmember pollution of reservation waters (Pet. 70a-91a) which had been assembled after Petitioners had submitted their response. A.R., Vol. II at tabs 25, 30, 31.

B. Judicial Review of EPA's Decision

In May 1995, Petitioners sought judicial review of EPA's decision. Pet. 19a. The District Court issued its opinion and judgment in March 1996 upholding EPA's determination that the Tribes possessed inherent authority over nonconsenting nonmembers on fee lands. Pet. 16a. The District Court largely adopted EPA's Final Rule analysis. On appeal, the Ninth Circuit affirmed. Pet. 1a. In so doing it first rejected EPA's suggestion that its interpretation of federal Indian law was entitled to deference. Pet. at 11a. Explaining that this Court's decisions had left "some confusion as to what the correct standard should be" (Pet. at 10a), the Court of Appeals concluded

that "EPA has [not] committed any material mistakes of law in its delineation of the scope of inherent tribal authority" (Pet. 11a) and that its analysis "appear[ed] to adumbrate the Supreme Court's holding in *Strate* . . . [which] reaffirms the validity of *Montana*" (Pet. 12a).

Turning to EPA's application of the second *Montana* exception, the Court of Appeals cited *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981), for two general propositions: (1) that "threats to water rights may invoke inherent tribal authority over non-Indians"; and (2) that water is a "unitary resource" which cannot be regulated along political boundaries. Pet. 12a. The court below distinguished *Strate* on the ground that "the conduct of a user of a small stretch of highway has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the principal water source." Pet. 12a-13a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' APPLICATION OF THE SECOND *MONTANA* EXCEPTION CANNOT BE RECONCILED WITH *STRATE* AND PRESENTS AN IMPORTANT FEDERAL QUESTION CONCERNING THE SCOPE OF THAT EXCEPTION.

A.

In *Strate* this Court observed that, "[r]ead in isolation, the *Montana* rule's second exception can be misperceived." 117 U.S. at 1416. The Court of Appeals' decision, like EPA's decision that it affirms, exemplifies just such a

misperception by transforming the second exception into a virtually irrebuttable presumption in favor of tribal authority where water quality regulation is involved. This case thus presents the Court with an opportunity to further clarify in an exceedingly important context the proper application of the *Montana* rule and its second exception.

The Court of Appeals' errors are twofold. The first is its view that, by reaffirming *Montana*'s approach to determining the reach of inherent tribal authority over nonmembers with respect to conduct on nontribal land, *Strate* also sanctioned the proposition that the second exception requires little more than a generalized, and plainly quite subjective, "tribal interest" inquiry to rebut the presumption against the existence of such authority. The second lies in conducting that inquiry without reference to how the involved tribal interests can otherwise be protected from nonmember activities under extant state and federal law. Central to this conclusion is a proper understanding of this Court's reasoning both in *Strate* and in *Brendale*.

Brendale presented the question whether the Confederated Tribes and Bands of the Yakima Nation had the authority to impose their zoning ordinance as to activities on fee land owned by tribal nonmembers. One of the involved parcels was in an area of the reservation (the "closed area") that was almost wholly tribally-owned and that traditionally had been closed to non-Indian entry. 492 U.S. at 415. The other parcel was in an area of the reservation (the "open area") where, by virtue of allotment-era policies, access was not restricted and over half of the land was owned by tribal nonmembers. *Id.* at 415-16. A splintered Court upheld the Tribes' power to

enforce their zoning ordinance with respect to the closed area (*id.* at 444) but denied the Tribes' power to do so with respect to the open area. *Id.* at 432.

Justice White, writing for himself and three members of the Court, flatly rejected the notion that every "direct effect" on a protected tribal interest may form a basis for the exercise of inherent tribal authority over nonmembers under the second *Montana* exception. He explained that the court of appeals had incorrectly "transformed this indication that there may be other cases in which a tribe has an interest in activities of nonmembers on fee land into a rule describing every case in which a tribe has such an interest" (*id.* at 429), and had otherwise improperly "equated an Indian tribe's retained sovereignty with a local government's police power, which is contrary to *Montana* itself." *Id.*; *see also id.* at n.11 (same).

Instead, "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land" (*id.* at 430), and that

> *Montana* suggests that in the special circumstance of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health or welfare of the tribe. But . . . that interest does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe. The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe.

Id. at 430-31. Justice White's understanding of how the second exception was to be applied was taken directly from *Montana* itself. There, in holding that the tribe lacked inherent authority to regulate nonmember hunting and fishing on fee lands, the Court explained that

> the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, has established its season, bag or creel limits in such a way as to impair the [tribe's] treaty rights to fish or hunt, or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State.

Montana, 450 U.S. at 566 n.16. Justice White's *Brendale* opinion thus clarified what was already established in *Montana*: that the second exception may serve as a basis for direct tribal authority over nonconsenting nonmembers in few situations; and that a tribe's recourse normally lies in pursuing available state and federal remedies to mitigate the alleged infringement on tribal interests. Accordingly, the Tribe in *Brendale* should have first presented its claim in proceedings before the local government zoning board and, if adequate relief was not forthcoming, then in a federal cause of action designed to protect the interests *defined by* the exception. 492 U.S. at 430; *see also id.* at 460 (Blackmun, J., concurring in part & dissenting in part) (criticizing Justice White's "new-fangled federal nuisance-type cause of action").

Justice Stevens, joined by Justice O'Connor, focused on the tribes' original power to exclude nonmembers from tribal territory – "a power unknown to any other sovereignty in this Nation" (492 U.S. at 433) – and drew a

distinction between the closed and open areas of the reservation. With respect to the closed area, he reasoned that

> just as Congress could not possibly have intended in enacting the Dawes Act that tribes would maintain the power to exclude bona fide purchasers of reservation land from that property, it could not have intended that tribes would lose control over the character of their reservations upon the sale of a few, relatively small, parcels of land.

Id. at 441. With respect to the open area, Justice Stevens concurred with Justice White that "the tribe lacks authority to regulate the use of [the] property," explaining that "so long as [it] is not used in a manner that is preempted by federal law, the Tribe has no special claim for relief." *Id.* at 445.

Most critical here is the fact that in *Brendale* six members of this Court agreed that state and federal remedies, not direct tribal regulation predicated on inherent authority, were to be utilized to protect tribal interests in reservation areas where allotment-era or other acts operated to eliminate the territorial exclusivity that is a necessary condition to the effective exercise of territorial sovereign power. *Accord South Dakota v. Bourland*, 508 U.S. 679 (1993); *see generally* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809, 894-902 (1996).

The principles embodied in *Strate* flow directly from the Court's earlier dialogue in *Brendale*. *Strate*'s primary significance here lies in the Court's unanimous reaffirmation of *Montana*'s presumption against tribal authority

over nonmembers (117 S. Ct. at 1409-10) and in its further explication of the purpose and scope of the second exception. In discussing the second *Montana* exception, the Court initially observed: "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members[,] [b]ut if *Montana*'s second exception requires no more, the exception would severely shrink the rule." *Id.* at 1415.

The Court then explained that the four cases[4] cited in *Montana* in support of the second exception "indicate[d] the character of the tribal interest the Court envisioned." 117 S. Ct. at 1415. Each of those cases focused on "the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government." *Id.* The second exception thus was intended as a shield to be used where "needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them' " (*id.* at 1416 (quoting *Williams*, 358 U.S. at 220)); and not as a sword to project tribal coercive powers over nonmembers whenever some "tribal interest" can be identified.

Strate clarifies that the presumptive absence of inherent tribal authority as to nonmember activity on nontribal lands within a reservation is not rebutted under the second *Montana* exception except when such authority is essential to tribal *self*-governance; i.e., when application

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[4] *Fisher v. District Court*, 424 U.S. 382 (1976) (per curiam); *Williams v. Lee*, 358 U.S. 217 (1959); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); *Thomas v. Gay*, 169 U.S. 264 (1898).

of tribal law is essential to preserve a tribe's inherent power "[to punish tribal offenders], to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Id.* at 1416 (quoting *Montana*, 450 U.S. at 564). The Court's citation to infringement test in *Williams v. Lee* is accordingly critical, because it stands for the principle that the exercise of inherent tribal authority over nonmember fee land activity is limited to situations where state law has been preempted by virtue of interference with tribal self-government. Absent preemption, the "optional use" of tribal law is not essential to protecting the tribe's ability to govern itself or to order its internal affairs. 117 S. Ct. at 1416.

The Court of Appeals' interpretation of *Montana*'s second exception "would severely shrink the [general] rule" by inserting in its stead a standardless approach for determining inherent tribal authority. Boiled down to its essentials, the court's conclusion that tribal authority exists here is grounded in a determination that the protection of water quality is qualitatively different from and more important to Indian tribes than highway safety (*Strate*), land use (*Brendale*), or fish and wildlife regulation (*Montana*). Clearly, the notion that "water is more important than land" cannot serve as a meaningful normative standard. As this case reveals, such an approach is constrained by little more than the decision-maker's policy preferences. More important, however, is that the failure of the Court of Appeals to consider extant state and federal remedies cannot be reconciled with *Strate*.

B.

There has been no reasoned claim in this case – and certainly no finding by EPA or any court – that Montana's water quality laws have been preempted with respect to nonmember activities on fee lands on the Reservation. Nor could there be one. Just as Congress did not delegate federal authority to tribes in adopting § 518, so too it did not preempt state law in the 1987 amendments to the Act. A different conclusion would be incompatible with 33 U.S.C. § 1370 (Pet. 130a), which specifically disclaims any intent "[e]xcept as expressly provided" to "impair[] or in any manner affect[] any right or jurisdiction of the States with respect to the water . . . of such States." *See* Pet. at 65a ("EPA['s] regulations . . . do not construe the CWA . . . as preempting State regulation"); *cf. Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 922 (1st Cir. 1996) (disapproving district court's conclusion that grant of TAS status to tribe evidenced Federal Government's intent to establish "Indian country" or otherwise preempt state law).

Questions of preemption aside, there is also no support in the record for an argument that Montana's laws are inadequate to protect the Tribes' treaty rights or more general interest in clean water. To the extent those interests may be affected, the State has the authority to protect them by requiring Petitioners to comply with state-established water quality standards (Mont. Code Ann. § 75-5-103(23) (defining "person" to include State or political subdivision); *id.* §§ 75-5-301 to -317 (classification of and standards for surface waters) and to secure and comply with state-issued discharge permits (*id.* §§ 75-5-401 to -405 (discharge permits). *See also id.*

§§ 75-5-601 to -641 (enforcement, appeals and penalties). Finally, even assuming arguendo state law is preempted or in some way inadequate, the Court of Appeals' decision additionally fails to explain why direct federal promulgation of water quality standards (33 U.S.C. § 1313(c)(4) (Pet. 122a)), coupled with federal issuance of discharge permits (33 U.S.C. § 1342(a); *see generally Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1991)) and, if necessary, federal enforcement against Petitioners for any standard or permit violation (33 U.S.C. § 1319(b), (e) and (g)), would be inadequate to protect the Tribes' interests.

C.

This case involves the first instance of a federal appeals court's recognizing the existence of inherent tribal authority over the governmental activities of a State or its political subdivisions. This absence of historical precedent for the Ninth Circuit's ruling is of obvious significance in determining its correctness (*see, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197-206 (1978); *Duro v. Reina*, 495 U.S. 676, 690-93 (1990)), but it additionally raises the question whether application of tribal jurisdiction over the States through the second *Montana* exception is permissible in any instance.

It is, as a threshold matter, extraordinary to conclude that a sovereign State and its counties or towns are subject to the coercive powers of a tribe whose inherent authority is unconstrained by the careful delineation of federal and state powers in the Constitution. Indeed, to so conclude would be to accept that tribes, as "domestic *dependent* nations" (*Cherokee Nation v. Georgia*, 30 U.S. (5

Pet.) 1, 16 (1831)) (emphasis supplied) possess comparable – indeed perhaps greater – powers with respect to the States than their guardian the Federal Government itself. *Cf. Kiowa Tribe of Okla. v. Manufacturing Tech., Inc.*, No. 96-1037, 1998 WL 260001, at *6 (U.S. May 26, 1998) (Stevens, J., dissenting) ("Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations?") This proposition cannot be squared with a constitutional plan under which the Federal Government's *own* powers derive from the States' agreement to divest themselves of authority for purposes of forming a national government. *See, e.g., New York v. United States*, 505 U.S. 144, 155-66 (1992) ("[t]he Constitution has never been understood to confer upon Congress the ability to require States to govern according to Congress' instruction"); *cf. Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991) (rejecting notion that "the States had waived their [Eleventh Amendment] immunity against Indian tribes when they adopted the Constitution"); *Kiowa Tribe*, 1998 WL 260001, at *3 (same).

These federalism concerns counsel that the exercise of inherent tribal authority over the governmental activities of state and local governments can be justified, if at all, only in quite exceptional circumstances. *Cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) ("in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members"). Such circumstances are plainly absent here since the Tribes' interest with respect to water quality is protected under state and federal law.

II. THE COURT OF APPEALS' DECISION HAS BROAD SIGNIFICANCE NOT ONLY WITH RESPECT TO FUTURE APPLICATION OF THE ACT'S TAS PROVISION BUT ALSO IN OTHER SITUATIONS WHERE THE SECOND *MONTANA* EXCEPTION IS RELIED UPON AS A BASIS FOR THE EXERCISE OF INHERENT TRIBAL AUTHORITY OVER NONMEMBERS.

The numerical and geographic magnitude of the TAS issue is illustrated by the fact that as of March 1998, over 210 tribes nationwide have received or are in the process of seeking TAS status under the Act or the counterpart TAS provision of the Safe Drinking Water Act, 42 U.S.C. § 300j-11. *EPA Treatment of Tribes in The Same Manner as States/Program Approval Matrix* (March 1998) (Pet. 135a).[5] Although the majority of the tribal submissions involve grant requests under § 106 of the Act, 33 U.S.C. § 1256, to assist in developing pollution control programs, the sheer number of tribes currently in the planning stages reflect the need to determine whether EPA's application of the second *Montana* exception is correct.

With respect to the specific parties to this proceeding, moreover, it is clear that this decision will be viewed by EPA as preclusive in all subsequent TAS applications by the Tribes under other environmental programs involving water. This point is demonstrated by the fact that, while

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[5] Petitioners' counsel received a copy of this document from the American Indian Environmental Office, U.S. Environmental Protection Agency, 401 M Street SW, Washington D.C., 20460. It is submitted for the Court's consideration pursuant to Sup. Ct. Rule 14.1.(i)(vi).

EPA attempted to limit its decision to this specific situation (Pet. 50a, 60a), it had explained several months earlier that

> once [EPA] makes a jurisdictional determination in response to a tribal application regarding any EPA program, it will ordinarily make the same determination for other programs unless the subsequent application raises different legal issues.

Final Rule, 59 Fed. Reg. at 64,340. In a similar manner, the Ninth Circuit's decision may also be viewed as the predicate for independent tribal enforcement of their water quality standards against Petitioners and others similarly situated. *See* Pet. at 60a (noting that "the Tribes may, in an independent action, enforce tribal water quality standards"). Affirmance of EPA's TAS determination thus may have far-reaching effects for both Petitioners and other nonmembers on the Reservation.

It must be emphasized finally that the Court of Appeals applied *general* principles of federal Indian law to reach the holding below. Consequently, while this dispute was precipitated by a TAS application under the Clean Water Act, the analysis employed by the court is not limited to that context. At a very minimum the standardless "tribal interest" approach sanctioned by the Ninth Circuit will allow EPA easily to extend "generalized findings" beyond the water context into any other subject matter encompassed by a federal environmental program. A more likely result, however, is that the court's standardless approach will be employed more broadly in the Ninth Circuit and perhaps other circuits to expand the reach of inherent tribal authority far outside the

highly limited purpose assigned the second *Montana* exception in *Strate*.

Timely guidance from this Court on an issue of critical importance to the formulation of tribal regulatory programs is therefore warranted. It makes little sense to await further case law development when the Court of Appeals' decision is so obviously suspect. No less important, delaying resolution of the issue here does little justice to EPA, to those Indian tribes that desire to establish regulatory programs, or to the public and private parties who will be obligated to comply with the tribal programs, if the jurisdictional basis of those programs is removed a number of years later. Early and clear guidance from this Court on this important question will assist in preserving public and private resources.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

JOSEPH P. MAZUREK
Attorney General of Montana
CLAY R. SMITH
Solicitor
HARLEY R. HARRIS
Assistant Attorney General
Counsel of Record
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006
(202) 736-8270

May 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF MONTANA; LAKE COUNTY, MONTANA, a political subdivision of the State of Montana; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation, *Plaintiffs,* and FLATHEAD JOINT BOARD OF CONTROL, MISSION IRRIGATION DISTRICT, JOCKO VALLEY IRRIGATION DISTRICT, FLATHEAD IRRIGATION DISTRICT, local governments; ROSS MIDDLEMIST, WAYNE MAUGHAN, WILLIAM SLACK and GLENN MURPHY, *Plaintiffs-Intervenors-Appellants,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; and the CONFEDERATED SALISH and KOOTENAI TRIBES, *Defendants-Appellees.*	No. 96-35505 D.C. No. CV-95-00056-CCL OPINION

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,	No. 96-35508
Plaintiffs-Appellants,	
v.	D.C. No. CV-95-00056-CCL
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States EPA; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,	
Defendants-Appellees.	

Appeals from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
September 8, 1997 – Seattle, Washington

Filed March 3, 1998

Before: Mary M. Schroeder and Robert R. Beezer, Circuit Judges and William W Schwarzer,* District Judge.

Opinion by Judge Schroeder

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* Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation

COUNSEL

Harley Harris, Assistant Attorney General, Helena, Montana, for plaintiffs-appellants.

Kevin Washburn, Department of Justice, Washington, D.C., for the defendants-appellees.

Daniel Decker, Marion Yoder, and John Carter, Tribal Legal Department, Confederated Salish and Kootenai Tribes of the Flathead Nation, Pablo, Montana, for tribal-appellees.

Arthur Lazarus, Jr., Sonosky, Chambers, Sachse & Enderson, Washington, D.C., amicus curiae for Assiniboine and Sioux Tribes of Fort Peck Reservation, Montana.

Jon Metropoulos, Helena, Montana, for the plaintiffs-intervenors-appellants.

Jeanne S. Whiteing, Whiteing & Thompson, Boulder, Colorado, amicus curiae for Blackfeet Tribe.

Sam W. Maynes, Maynes, Bradford, Shipps & Sheftel, Durango, Colorado, amicus curiae for Southern Ute Indian Tribe.

Hans Walker, Jr., Hobbs, Straus, Dean & Walker, Washington, D.C., amicus curiae for Three Affiliated Tribes of Fort Berthold Reservation, North Dakota.

Thane P. Johnson, Werner, Epstein & Johnson, Cut Bank, Montana, amicus curiae for Montana Association of Counties.

Thomas L. Dosch and John S. Greene, Assistant Attorneys General for the State of Wisconsin as amici curiae for appellants.

Jeffery R. Cutter, Lyon, Weigand & Gustafson, Yakima, Washington, amicus curiae for Yakima Reservation Irrigation District.

OPINION

SCHROEDER, Circuit Judge:

This case is a facial challenge to regulations the Environmental Protection Agency (EPA) promulgated pursuant to

§ 518(e) of the Clean Water Act, 33 U.S.C. § 1377 (Supp.1997). That section authorizes EPA to permit Indian tribes "to be treated as a state" (TAS) for purposes of promulgating water quality standards (WQS) pursuant to § 303 of the Act. 33 U.S.C. § 1313 (1986). The plaintiffs-appellants, collectively referred to as "Montana," include state and municipal entities who own fee interests in land located within the boundaries of the Flathead Indian Reservation. The Reservation is occupied by the Confederated Salish and Kootenai Tribes. The Tribes, along with EPA officials, are the defendants-appellees.

Montana filed this action attacking EPA's decision to grant TAS status to the Tribes to promulgate WQS that apply to all sources of pollutant emissions within boundaries of the Reservation, regardless of whether the sources are located on land owned by members or non-members of the Tribe. Montana maintained that the regulations permit tribes to exercise authority over non-members that is broader than the inherent tribal powers recognized as necessary to self-governance. *See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989); *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

In addition, Flathead Irrigation District and related entities ("the Intervenors") have sought to intervene as of right in the action although their uses of the land are not sources of emissions regulated by the Clean Water Act.

The district court granted summary judgment to the defendants, and denied intervention by the Intervenors because they lacked any discernible interest in the subject matter of the litigation as required by Rule 24 of the Federal Rules of Civil Procedure. Montana and the Intervenors have each filed a separate appeal. We affirm in both.

BACKGROUND

The Clean Water Act

The Clean Water Act (CWA) prohibits discharges from a point source of any pollutant into waters unless the emission discharge complies with the Act's requirements. *See* 33 U.S.C. § 1311(a). For most discharges, such compliance is achieved by obtaining and adhering to the terms of a National Pollutant Discharge Elimination System (NPDES) permit. *See* 33 U.S.C. § 1342. NPDES permits are issued by EPA or, in those jurisdictions in which EPA has authorized a state agency to administer the NPDES program, by a state agency subject to EPA review. *See* 33 U.S.C. § 1342(b).

Under the NPDES program, each state must adopt WQS for its waters. *See* 33 U.S.C. § 1313. These standards are subject to review and approval by EPA. *See* 33 U.S.C. § 1313(a)-(c). Once WQS have been adopted, EPA will issue an NPDES permit only if the relevant state certifies that any discharges under the proposed permit will be consistent with its WQS. *See* 33 U.S.C. § 1341(a).

In 1987, Congress added § 518(e) to the CWA which authorized EPA to permit tribes "to be treated as a state" (TAS) for purposes of promulgating WQS. 33 U.S.C. § 1377(e). The relevant language of the provision is set forth in the margin.[1]

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[1] The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II . . . to the degree necessary to carry out the objectives to this section, but only if –

EPA issued a final rule in 1991 implementing the provision by setting forth the standards for processing tribal requests for TAS status and concomitant authority to institute WQS. *See Environmental Protection Agency*, 56 Fed.Reg. 64,876 (1991) (codified at 40 C.F.R. § 131.8(b)(3)) (hereinafter Final Rule). The Final Rule was promulgated after notice and comment, during which Montana voiced its objections to the rule as too broad. Conversely, some tribal interests, represented in this case by amici briefs, took the position that the authority was too narrow, and that Congress had in effect delegated the power to the tribes to promulgate WQS. EPA rejected both extremes and promulgated the regulations here at issue:

> 1. The tribe must be federally recognized and exercising governmental authority;
>
> 2. The tribe must have a governing body carrying out "substantial governmental duties and powers;"

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

> 3. The water quality standards program which the tribe seeks to administer must "pertain to the management and protection of water resources," which are "within the borders of an Indian reservation;"
>
> 4. The Indian tribe is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act and regulations.

40 C.F.R. 131.8(a).

The third requirement, with which we are principally concerned, is intended to reflect the scope of a tribe's "inherent power," a concept developed by the Supreme Court to define when tribes may engage in nonconsensual regulation of activities of non-members. *See Montana*, 450 U.S. at 565-66, 101 S.Ct. at 1258; *United States v. Wheeler*, 435 U.S. 313, 322, 98 S.Ct. 1079, 1085-86, 55 L.Ed.2d 303 (1978).

To demonstrate authority over the activities of non-members on non-Indian fee lands, EPA requires a tribe to show that the regulated activities affect "the political integrity, the economic security, or the health or welfare of the tribe." Final Rule, 56 Fed.Reg. at 64,877 (quoting *Montana*, 450 U.S. at 566, 101 S.Ct. at 1258). The potential impacts of regulated activities on the tribe must be "serious and substantial." *Id.* at 64,878.

EPA believes that tribes will normally be able to demonstrate that the impacts of regulated activities are serious and substantial due to "generalized findings" on the relationship between water quality and human health and welfare. *See id.* Nonetheless, under the Final Rule

EPA will make a case-specific determination on the scope of each tribal applicant's authority. *See id.* Because EPA's generalized findings will be incorporated into the analysis of tribal authority, the factual showing required under § 131.8 is limited to the tribe's assertion that (1) there are waters within the reservation used by the tribe, (2) the waters and critical habitat are subject to protection under CWA, and (3) impairment of waters would have a serious and substantial effect on the health and welfare of the tribe. *See id.* at 64,879.

Once the tribe meets this initial burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality, presume that there has been an adequate showing of tribal jurisdiction over fee lands. *See id.* Unless the party objecting demonstrates the tribe's lack of jurisdiction, the EPA will determine there is inherent authority. *See id.*

THE FLATHEAD RESERVATION APPLICATION AND APPROVAL FOR TAS STATUS

In 1992, the Tribes applied for TAS status with respect to all surface waters within the Flathead Indian Reservation. The Flathead Indian Reservation in Montana is marked by at least two important characteristics that have shaped this litigation. First, its dominant topical feature is Flathead Lake, a large lake that, with its tributaries, provides water for domestic, industrial, and agricultural uses on the lands within the Reservation boundaries. Second, the land within those boundaries reflects a pattern of mixed ownership and control

between tribal and non-tribal entities. These non-tribal entities include the state, the county, and several municipalities that engage in regulated discharges on the Reservation pursuant to existing NPDES permits.

In their application for TAS status, the Tribes identified several facilities on fee lands within the Reservation that have the potential to impair water quality and beneficial uses of tribal waters. These include feedlots, dairies, mine tailings, auto wrecking yards and dumps, construction activities and landfills. Other actual or potential point sources include wastewater treatment facilities, commercial fish ponds and hatcheries, slaughterhouses, hydroelectric facilities and wood processing plants.

Montana opposed granting the Tribes TAS status to the extent such status would extend to reservation lands and surface waters owned in fee by non-members of the Tribes. The EPA director approved the Tribes' application after determining that the Tribes possessed inherent authority over non-members on fee lands. Montana then filed this action.

The Montana Appeal and the Scope of Inherent Authority

In general, absent express authorization by federal statute or treaty, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation. *See Montana*, 450 U.S. at 564, 101 S.Ct. at 1258. *See also Strate v. A-1 Contractors*, ___ U.S. ___, ___, 117 S.Ct. 1404, 1409, 137 L.Ed.2d 661 (1997) (reaffirming). The Court in *Montana* noted, however, that in certain circumstances, even where Congress has not expressly authorized it, Indian tribes retain inherent sovereign

power to exercise civil jurisdiction over non-Indians on fee lands. *See Montana*, 450 U.S. at 566, 101 S.Ct. at 1258. The first exception to the general rule relates to non-members who enter consensual relationships with the tribe or its members. *See id.* at 565, 101 S.Ct. at 1258. The second exception concerns conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 556, 101 S.Ct. at 1258.

Although the Supreme Court has applied the *Montana* rule in subsequent cases, the Court's 1989 fractured decision in *Brendale*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343, left some confusion as to what the correct standard should be. *Brendale* involved the authority of tribes to zone non-Indian fee land. Although the Justices disagreed over how to apply *Montana's* second exception in that context, a majority of the Justices nonetheless agreed that the *Montana* rule controlled. *Id.* Later, in *Strate*, a unified court reaffirmed the vitality of *Montana*. In *Strate*, which was after the district court decision in this case, the Court stressed that there must be a nexus between the regulated activity and tribal self-governance in order for the second *Montana* exception to apply. *See Strate*, at ___, 117 S.Ct. at 1416.

Montana's position in the district court and in this court has been that EPA got the scope of inherent authority wrong, and that the Tribes should be able to engage in nonconsensual regulation of non-tribal entities only when all state or federal remedies to alleviate threats to the welfare of the tribe have been exhausted and have proved fruitless. Their brief relies heavily upon the opinions of Justices Stevens and White in *Brendale* to argue that the

Brendale decision effectively repudiated the *Montana* standard. That standard, in appellants' view, had erroneously equated tribal sovereignty with local government police power.

We agree with appellants insofar as they contend that the scope of inherent tribal authority is a question of law for which EPA is entitled to no deference. EPA's decision to adopt inherent tribal authority as the standard intended by Congress may well be viewed in a deferential light because the statute's language and legislative history were not entirely clear. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). EPA's delineation of the scope of that standard, however, has nothing to do with its own expertise or with any need to fill interstitial gaps in the statute committed to its regulation. Therefore, EPA's delineation of the scope of tribal inherent authority is not entitled to deference.

We cannot agree with appellants, however, that EPA has committed any material mistakes of law in its delineation of the scope of inherent tribal authority. Rather, the agency took a cautious view by incorporating both Justice White's and Justice Stevens' admonitions in *Brendale* that, to support the exercise of inherent authority, the potential impact of regulated activities must be serious and substantial. *See Final Rule*, 56 Fed.Reg. at 64,878; *Brendale*, 492 U.S. at 431, 109 S.Ct. at 3008 (White, J.); *id.*, 492 U.S. at 447, 109 S.Ct. at 3016 (Stevens, J.). Moreover, in Justices Stevens' and White's opinions, upon which Montana relies, there is no suggestion that inherent authority exists only when no other government can act.

Indeed the EPA decision appears to adumbrate the Supreme Court's holding in *Strate*, ___ U.S. ___, 117 S.Ct. 1404, 137 L.Ed.2d 661, that the exercise of tribal jurisdiction over non-tribal members engaged in traffic accident litigation was not necessary to the self-governance of the tribe. We therefore disagree with appellants that *Brendale* overruled *Montana*. The *Strate* decision reaffirms the vitality of *Montana*; *Brendale* did not repudiate it.

EPA's decision, applying its standards in this case, found that the activities of the non-members posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential. We have previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians. "A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. This includes conduct that involves the tribe's water rights." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (1981) (internal citations omitted, emphasis added). *Colville* also supports EPA's generalized finding that due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation: "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users." *Id.*

In contrast, the tribes in *Strate* reserved no right to exercise control over the federal right-of-way maintained by the state. *See Strate*, at ___, 117 S.Ct. at 1414. Furthermore, the conduct of users of a small stretch of highway

has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the principal water source.

Our decision is also fully consistent with the only other circuit opinion that has yet considered the issue of tribal authority to set water quality standards. *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir.1996). In that case, the tribe had promulgated WQS that were more stringent than federal standards. The city contended that the tribal standards could not be more stringent than federal standards. The court rejected the contention, observing that the authority to establish such standards "is in accord with powers inherent in Indian tribal sovereignty." *Id.* at 423.

Accordingly, we affirm the district court's decision that EPA's regulations pursuant to which the Tribe's TAS authority was granted are valid as reflecting appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members.

THE INTERVENORS' APPEAL

The Intervenors consist of the Flathead Joint Board of Control, two irrigation districts, and four individual irrigators who own land in fee situated within the boundaries of the Reservation. None of the proposed intervenors, however, holds an NPDES permit that may potentially be modified due to any change in WQS imposed by the Tribes.

To prevail on a motion to intervene as of right, the intervenor must (1) make a timely motion, (2) claim a

"significantly protectable" interest in the property that is the subject of the action, (3) demonstrate impairment of its ability to protect that interest, and (4) prove that the interest is inadequately represented by the parties to the action. *See Sierra Club v. EPA,* 995 F.2d 1478, 1481 (9th Cir.1993).

The district court held that because the Intervenors do not hold NPDES permits, the transfer of the right to establish WQS from the state to the Tribes "will have no immediate or any foreseeable, demonstrable effect upon the proposed intervenors." In their briefs to this court, the Intervenors attempt to state a broader interest in the enforcement process by suggesting that the imposition of standards promulgated by the Tribes would violate their civil rights by subjecting them to tribal jurisdiction. They also argue that EPA approval of tribal WQS would depress the value of their property.

Because the Intervenors hold no NPDES permits they could not be subject to NPDES enforcement proceedings. Moreover, TAS status does not confer enforcement authority on the Tribes; it only enables the Tribes to set the standards. Even if the Tribes applied for enforcement authority, the NPDES permits would still be issued by EPA and enforced in federal, not tribal, courts. Finally, even assuming that EPA's approval of the tribal WQS program might affect property values, such a speculative and purely economic interest does not create a protectable interest in litigation concerning a statute that regulates environmental, not economic, interests. *See Portland Audubon Soc'y v. Hodel,* 866 F.2d 302, 309 (9th Cir.1989) (an adverse economic impact does not create a significant

protectable interest in litigation under the National Environmental Policy Act); *see also Sierra Club,* 995 F.2d at 1485-86 (city that holds permit under CWA has a protectable interest in CWA litigation that might affect a city's discharge from permitted operations).

CONCLUSION

The district court correctly entered summary judgment in favor of the defendants on the underlying challenge to the grant of TAS status to the Tribes, and it also correctly denied the Intervenors' application to intervene as of right. Its judgment is AFFIRMED.

STATE OF MONTANA; Lake County, Montana, a political subdivision of the State of Montana; City of Ronan, Montana, a municipality of the State of Montana; and Town of Hot Springs, Montana, a municipal corporation, Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; Carol Browner, Administrator of the United States Environmental Protection Agency; and the Confederated Salish and Kootenai Tribes, Defendants.

No. CV 95-56-M-CCL.

United States District Court,
D. Montana,
Missoula Division.

March 27, 1996.

Joseph P. Mazurek, Attorney General for State of Montana, Harley R. Harris, Clay R. Smith, Office of the Montana Attorney General, Helena, MT, for Plaintiffs.

Sherry S. Matteucci, U.S. Attorney, District of Montana, Office of the U.S. Attorney, Billings, MT, Deanne L. Sandholm, Office of the U.S. Attorney, Helena, MT, David A. Carson, U.S. Department of Justice, Environmental Enforcement, Denver, CO, Lauren N. Soll, U.S. Department of Justice, Environment & Natural Resources, Washington, DC, for Defendant Environmental Protection Agency and Defendant Carol M. Browner.

Daniel F. Decker, Confederated Salish & Kootenai Tribes, Legal Department, Pablo, MT, for The Confederated Salish and Kootenai Tribes of the Flathead Nation.

Jon Metropoulos, Doney, Crowley, Bloomquist & Metropoulos, P.C., Helena, MT, for Flathead Joint Board

of Control, Mission Irrigation District, Jocko Valley Irrigation District, Flathead Irrigation District, Ross Middlemist, Wayne W. Maughan, William Slack, Glenn Murphy.

OPINION AND ORDER

LOVELL, District Judge.

Before the court is a motion to intervene filed by the Flathead Joint Board of Control, the Mission Irrigation District, the Jocko Valley Irrigation District, the Flathead Irrigation District, Ross Middlemist, Wayne Maughan, William Slack, and Glenn Murphy. The Defendants oppose the motion, but Plaintiff consents to the intervention. Also before the court are cross motions for summary judgment.

1. Background.

In July, 1993, the Confederated Salish and Kootenai Tribes (the "Tribes") submitted a completed application for treatment-as-state ("TAS") status under section 303, 33 U.S.C. § 1313, of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1987 & 1995 Cum.Supp.), with respect to all surface waters within the Flathead Indian Reservation (the "Reservation"). The Environmental Protection Agency ("EPA") notified the State of Montana ("Montana") of the Tribes' application pursuant to 40 C.F.R. § 131.8(c)(2). Montana timely filed its comments regarding the application in accordance with 40 C.F.R. § 131.8(c)(3). Montana opposed the EPA granting the Tribes TAS status on the ground that the Tribes do not possess inherent civil regulatory authority over lands

owned by nonmembers. Montana also contested factual assertions made by the Tribes in its application and requested an evidentiary hearing through which Montana could contest the Tribes' factual allegations. Because only Montana was considered an "appropriate governmental entity" entitled to make comments on the Tribes application, *see* 56 Fed.Reg. 64876, 64884 (December 12, 1991), the local government Plaintiffs and the proposed intervenors submitted their comments through Montana. All public comments were considered by the EPA before reaching its decision. *See* Decision Document, p. 7, AR # 27.

On February 27, 1995, the Director of EPA Region VIII approved the Tribes' application to establish water quality standards for surface waters within the Reservation under section 303 of the CWA. The EPA found that Montana did not rebut the presumption created by the Tribes' showing that pollution of surface waters traversing or appurtenant to nonmember land would have serious and substantial impact on the Tribes' health and welfare. On March 28, 1995, the Tribes adopted water quality standards for all surface waters on the Reservation.[1] The Tribe has submitted those standards to the EPA for approval in accordance with section 303(c) of the CWA.

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[1] The court notes that, according to the EPA Regional Administrator, the water quality standards actually adopted by the Tribes are "virtually identical" to the water quality standards set by Montana. *See* Letter of William P. Yellowtail to Senator Conrad Burns, Exhibit 2, Reply Brief in Support of Motion to Intervene.

2. Pleadings.

Plaintiffs filed their first amended complaint for declaratory and injunctive relief on June 8, 1995. Plaintiffs invoke the court's jurisdiction pursuant to the Administrative Procedures Act, 5 U.S.C. § 702.

(a) Plaintiffs' complaint.

Montana holds a permit that allows discharges into Flathead Lake from the State's Yellow Bay research facility. Montana's permit was issued by the State under the Montana Pollutant Discharge Elimination System ("MPDES"). Mont.Code Ann. § 75-5-605(2) (1994); Mont.Admin.R. 16.20.1300-.1347. Montana believes that because the EPA has decided to grant the Tribes treatment-as-state (TAS) status, the State will now be required to seek an additional permit from the EPA under its National Pollutant Discharge Elimination System ("NPDES") program. *See* 33 U.S.C. § 1342.

Lake County owns a wastewater treatment facility on the Reservation, which makes discharges into Post Creek. Lake County already holds an NPDES permit issued by the EPA.

The City of Ronan owns a wastewater treatment facility on the Reservation, which makes discharges into Crow Creek. Ronan holds an MPDES permit issued by the State of Montana. Ronan alleges that EPA is now requiring it to obtain an NPDES permit.

The Town of Hot Springs owns a wastewater treatment facility within the Reservation, which makes discharges into Hot Springs Creek. Hot Springs holds an

MPDES permit issued by the State of Montana. Hot Springs alleges that EPA is now requiring it to obtain an NPDES permit.

Plaintiffs' First Claim for Relief asserts that the EPA's final decision is based upon an erroneous application of legal principles relating to the Tribes' inherent regulatory authority and that the interested parties were not granted an evidentiary hearing attacking the facts upon which the agency decision was based. Furthermore, Plaintiffs state that the final decision improperly subjects them to the civil regulatory authority of the Tribes and infringes on Montana's authority under section 401 of the CWA.[2] Montana concludes that the EPA's decision to grant TAS status to the Tribes has or will in the future result in the State of Montana being deprived of its authority as a state under section 401 of the CWA.

Plaintiffs' Second Claim for Relief asserts that the Tribes are without authority to rely on the agency action for the purpose of regulating Plaintiffs' activities on the Reservation.

The Plaintiffs request a declaratory judgment that determines that the agency action granting TAS to the

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[2] Under section 401, 33 U.S.C. § 1341, the relevant state must certify to the EPA that a proposed NPDES permit will be in compliance with state's water quality standards. Of course, because the Tribes have been granted TAS status, Montana is no longer the certifying authority for purposes of section 401. However, whether Montana or the Tribes certifies compliance, in either instance the EPA retains final decision-making authority over the issuance of NPDES permits.

Tribes pursuant to section 518(e) of the CWA was unlawful and that the Tribes are without authority to rely upon the agency action.

(b) EPA's Answer to Plaintiffs' Complaint.

EPA concedes that Yellow Bay's compliance with the CWA is conditioned upon Yellow Bay's application for a NPDES permit if Yellow Bay discharges pollutants from a point source into waters of the United States on the Flathead Reservation.[3] EPA questions who historically considered Yellow Bay to be in compliance with the CWA. Likewise, EPA questions who historically considered Ronan's wastewater treatment facility to be in compliance with the Clean Water Act. EPA also admits that Ronan's compliance with the CWA is conditioned upon Ronan's application for and receipt of a federal NPDES permit if Ronan discharges pollutants from a point source into waters of the United States on the Flathead Reservation. EPA poses a similar question and states a similar admission as to the Town of Hot Springs.

EPA also avers that federal administrative remedies are available to any discharger who is required to obtain a permit from EPA pursuant to section 402 of the CWA. *See* 40 C.F.R. § 122-124 (1995). EPA admits that such a permit may include effluent limitations necessary to meet the water quality standards adopted by the Tribes. However, EPA asserts that it and not the Tribes will retain

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[3] The Tribes' Answer to Plaintiffs' Complaint avers that the Yellow Bay Wastewater Treatment Facility made an application for an NPDES permit on June 19, 1995.

NPDES permitting authority on the Reservation,[4] and that it and not Montana has always held CWA regulatory jurisdiction over the waters of the United States on the Flathead Indian Reservation. The EPA also asserts that the court lacks jurisdiction over Plaintiffs' claims, that the complaint states claims for which relief cannot be granted, that Plaintiffs lack standing, that Plaintiffs' claims are not ripe for review and are not justiciable.

(c) Tribes' Answer to Plaintiffs' Complaint.

The Tribes admit they have waived their sovereign immunity for purposes of accepting service of Plaintiffs' First Amended Complaint. The Tribes assert that Plaintiffs' claims are not within the zone of interests meant to be protected by the Clean Water Act and that Plaintiffs' interest has not been or will not be injured or adversely affected by agency action within the meaning of 5 U.S.C. § 704. The Tribes assert that there is no actual controversy upon which this court may declare the rights and legal relations, and therefore Plaintiffs' claims are not justiciable. The Tribes assert that Montana has failed to timely challenge the 1991 regulations upon which EPA's decision is based; the Tribes assert that Montana's claim is stale since Montana commented on the regulations and/or actively participated in the formulation of those regulations by the EPA. Finally, the Tribes assert that the Plaintiffs have failed to allege facts sufficient to establish a

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[4] *See* EPA's Memorandum in Opposition to JBC's Motion to Intervene, at p. 8.

valid facial challenge to the regulations and policy complained of in Plaintiffs' complaint.

(d) Proposed Plaintiff-Intervenors' proposed complaint.

The JBC and the Irrigation Districts provide water for over one hundred thousand acres of irrigated land,[5] and the water is delivered from the federal Flathead Irrigation and Power Project. Approximately 2,000 farmers and ranchers own this land. Proposed Intervenors bring their complaint pursuant to the APA, 5 U.S.C. § 702. Intervenor Irrigation Districts assert inter alia that they have been granted the power by the Montana Legislature to appropriate water, acquire water rights, acquire reservoirs and dams, and acquire the land for such works. Mont.Code Ann. § 85-7-1904 (1995). The Irrigation Districts also assert that they hold the power to regulate, supervise, apportion and control water distribution. Mont.Code Ann. § 85-7-1922 (1995).

The JBC and the Irrigation Districts have filed numerous lawsuits involving the irrigation system on the Reservation. They have filed water rights claims in the Montana Water Court pursuant to the Montana Water Use Act, Mont.Code Ann. § 85-2-101, et seq. (1995). They have, with Intervenors Middlemist and Maughan, filed

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[5] The Flathead Indian Reservation encompasses some 1.2 million acres, and contains approximately 4,000 natural stream miles. In addition, approximately 1300 miles of irrigation canals and laterals exist under the authority of the Flathead Agency Irrigation Division/Flathead Irrigation Project, Bureau of Indian Affairs, United States Department of the Interior.

suit against the Tribes to contest tribal Ordinance 87A, the Aquatic Lands Conservation Ordinance ("ALCO"). *Middlemist, et al. v. Pablo, et al.*, CV No. 95-68-M-CCL; *Middlemist, et al. v. Pablo, et al.*, No. 95-343- CV (Tribal Court). Without explanation, proposed Plaintiff-Intervenors suggest that this court's decision in this case may have stare decisis or res judicata effect on the ongoing litigation in *Middlemist v. Pablo.*

Proposed Plaintiff-Intervenors Wayne Maughan, Ross Middlemist, William Slack and Glenn Murphy are irrigators and members of the JBC and the Irrigation Districts. They commonly undertake typical irrigation activities in the course of farming and ranching.

Proposed Plaintiff-Intervenors complain that they received no individual notice of the Tribes' application for TAS status because the EPA has specifically excluded individuals and local governments from the TAS notice and comment process. *See* 40 C.F.R. § 131.8(c)(2) (1995); 56 Fed.Reg. at 64884. The EPA notifies, and requests the comments of, only the relevant federal agencies and state and tribal governments. However, the EPA does place an announcement in appropriate newspapers, directing interested parties to submit their comments to the appropriate state government. *Id.* In this case, all public comments submitted through the State of Montana were considered by the EPA.

Proposed Plaintiff-Intervenors assert that the Tribes have previously attempted to recover from the United States certain water rights, hunting and fishing rights, rights to land, and exclusive use and occupation of the reservation. *See* Act of March 13, 1924, 43 Stat. 21; Act of

July 30, 1946, 60 Stat. 715; Act of August 13, 1946, 60 Stat. 1049, Indian Claims Commission Act. Proposed Plaintiff-Intervenors theorize that the Tribes should now be precluded from making additional claims to sovereign authority over nonmember activity on fee land, having foregone such additional claims at earlier opportunities.

Proposed Plaintiff-Intervenors express concern that the Tribes might assert authority over either civil or criminal violations of the CWA. Proposed Plaintiff-Intervenors assert that they cannot receive a fair trial in a tribal court, which trial would, among other things, violate their right to be tried by a jury of their peers. Proposed Plaintiff-Intervenors object to the fact that the Tribes will not permit them to vote, hold office, sit on a jury, or act as tribal judges.

Proposed Plaintiff-Intervenors' First Claim for Relief asserts that the agency action is not in accordance with the law and has aggrieved them within the meaning of 5 U.S.C. § 702. The Second Claim for Relief asserts that the agency action was unlawful because it denied Murphy the opportunity to be heard. The Third Claim for Relief asserts that the agency action was unlawful because it presumed that the Tribes have civil regulatory jurisdiction over Murphy. The Fourth Claim for Relief asserts that the agency action violates the supremacy clause of the United States Constitution in that Congress has previously divested the Tribes of civil regulatory jurisdiction, and EPA cannot now contradict that divestment. The Fifth Claim for Relief asserts that the agency action is unlawful because it divests them of their federal constitutional right to full and equal participation in the government under which they must live.

3. Applicable Statutes and Regulations.

The EPA administers the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1987 & 1995 Cum.Supp.). The CWA was enacted in order to restore and maintain the quality of the Nation's waters, *see* 33 U.S.C. § 1251(a), and it prohibits the discharge from a point source[6] of any pollutant into the waters of the United States unless that discharge complies with the CWA. 33 U.S.C. § 1311(a). The CWA was amended in 1987 by the Water Quality Act of 1987 ("WQA"), P.L. 100-4, 101 Stat. 7. The WQA added a new provision, section 518, which allows the EPA to treat Indian tribes as states for certain purposes of the Act. 33 U.S.C. § 1377(e).

There are two major permit programs in the CWA. Section 402 of the CWA provides the framework for a permitting system for pollution dischargers, known as the National Pollutant Discharge Elimination System ("NPDES"). *See* 33 U.S.C. § 1342. Section 404 of the CWA provides the framework for an Army Corps of Engineers permitting system for discharges of dredged or fill material into the waters of the United States. *See* 33 U.S.C. § 1344.

The permit programs are based upon water quality standards that are set by the states pursuant to section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C). The

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[6] "[A]ny discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "[A]gricultural stormwater discharges and return flows from irrigation" are excluded from the definition of "point source." Id.

CWA requires each state to adopt water quality standards for its intrastate and interstate waters. 33 U.S.C. § 1313(a)-(c). The EPA must approve the water quality standards set by states. 33 U.S.C. § 1313(c)(1), (3). When the EPA is the permitting authority, states have the opportunity to certify whether a discharge under a proposed permit will be consistent with its water quality standards. 33 U.S.C. § 1341. If the state concludes that its water quality standards will not be achieved, then the permit cannot issue unless it is modified to comply with the standards. *Id.*

Irrigation is not an activity regulated by the CWA, which specifically excludes "agricultural stormwater discharges and return flows from irrigated agriculture" from point source regulation. 33 U.S.C. § 1362(14). The CWA does not regulate the extraction or allocation of groundwater or surface water, or any other water quantity right. 33 U.S.C. § 1251(g). Instead, the CWA regulates pollutants added to surface water from point sources. *See* 40 C.F.R. § 122.1(b).

Under section 518(e) of the WQA, the EPA is authorized to treat an Indian tribe in the same manner as a state for certain purposes, including the development of water quality standards. 33 U.S.C. § 1377(e); 40 C.F.R. §§ 131.3-131.8 (1995). Section 518 provides that:

> The Administrator is authorized to treat an Indian tribe as a State for purposes of title II and sections 104, 106, 303, 305, 308, 309, 314, 319, 401, 402, and 404 of this Act [33 U.S.C.S. §§ 1281 et seq., 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344] to the degree necessary

to carry out the objectives of this section, but only if –

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and of all applicable regulations.

Such treatment as a State may include the direct provision of funds reserved under subsection (c) to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to make grants under title II of the Act in an amount not to exceed 100 percent of the cost of a project. Not later than 18 months after the date of the enactment of this section, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this Act. The Administrator shall, in promulgating such regulations, consult affected States sharing common water

bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this Act.

* * *

(h)(1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; and

(2) "Indian tribe" means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

33 U.S.C. § 1377(e), (h) (1987 & Cum.Supp.1995) (emphasis added). The court has reviewed the amicus curiae brief submitted by the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana, whose application to EPA for TAS status is now pending. Amicus counsel asserts, based upon the statutory language emphasized above, that section 518 provides tribes

with federally-delegated tribal jurisdiction over non-Indians. Their reading emphasizes the fact that in section 518(h) Congress expressly included all lands of the Reservation within its definition of the Reservation, "notwithstanding the issuance of any patent," and in section 518(e) Congress expressly specified that the Tribes should manage and protect water resources that are (1) held by an Indian tribe, (2) held by the United States in trust for Indians, (3) held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or (4) otherwise within the borders of an Indian reservation. It appears that the legislative history is ambiguous, although only arguably so since the legislative history relates mainly to concern regarding whether section 518(e) pertains to water quantity rights of non-Indians, which of course it does not.

Congress may delegate such jurisdiction to Indian tribes. *See United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717-18, 42 L.Ed.2d 706 (1975) (affirming federal conviction for violation of tribal liquor ordinance on basis of a federal delegation to the Wind River Tribe of right to regulate liquor trade on reservation). Indeed, the statutory language seems to indicate plainly that Congress did intend to delegate such authority to tribes if the three criteria listed in section 518(e) were met. In fact, in the *Brendale* decision, Justice White, writing for the Court, cited this very statute as an example of an explicit delegation of Congressional authority to Indian tribes. *See Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 428, 109 S.Ct. 2994, 3006-07, 106 L.Ed.2d 343 (1989) (White, J.). This interpretation of sections 518(e) and (h)(1) comports with common-sense, for it seems

highly unlikely that Congress contemplated granting to tribes the authority to set water quality standards for only those segments of streams traversing or appurtenant to Indian lands, while at the same time state water quality standards would remain in effect on the reservation for those same streams where the stream segments traverse or bound non-Indian land. However, EPA determined that it would take the more cautious view, that Congress did not expressly delegate jurisdiction to tribes over non-Indians and that tribes would have to prove on a case-by-case basis that they possess such jurisdiction. *See* 56 Fed.Reg. 64,876, 64,879-80 (1991).

The application regulations are found at 40 C.F.R. § 131.8, adopted by the EPA on December 12, 1991. 56 Fed.Reg. 64895 (Dec. 12, 1991), as amended at 59 Fed.Reg. 64344 (Dec. 14, 1994). § 131.8(a) provides that:

> The Regional Administrator . . . may accept and approve a tribal application for purposes of administering a water quality standards program if the Tribe meets the following criteria:
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> (1) The Indian Tribe is recognized by the Secretary of the Interior . . . ,
>
> (2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers,
>
> (3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a

> member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and
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> (4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.
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> 40 C.F.R. § 131.8(a) (1995).

In the preamble to EPA's Final Rule regarding the procedures by which an Indian tribe may qualify for TAS, the EPA analyzes inherent tribal authority over reservation lands owned in fee by nonmember. 56 Fed.Reg. 64876. Specifically, the EPA analyzes *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989). The EPA adopted an interim operating rule, to be applied on a case-by-case basis, to determine whether an Indian tribe has authority over reservation lands owned in fee by nonmembers. 56 Fed.Reg. at 64878-79.

The EPA's operating rule is based on the second *Montana* exception allowing for tribal authority over nonmember lands: "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66, 101 S.Ct. at 1258. The EPA's operating rule requires a tribe to show that the

"potential impacts of regulated activities on the tribe are serious and substantial." 56 Fed.Reg. at 64878. In other words, the EPA does not require a tribe to wait until a point source discharger located on non-Indian lands is actually polluting tribal waters before the tribe can apply for TAS status; instead, a tribe can simply show that there is a potential for such pollution in the future and were such pollution to occur it would have serious and substantial impacts upon the tribe.

In determining the scope of inherent tribal authority for purposes of section 518(e), the EPA considered the Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (4:2:3 split, deciding that county should have exclusive zoning authority over non-Indian property in predominantly fee area but tribe should have exclusive zoning authority over non-Indian property in predominantly tribal area). The EPA determined that the primary significance of *Brendale* is that its result is consistent with the exceptions stated in *Montana*:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate . . . the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct

> threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66, 101 S.Ct. at 1258 (citations omitted). The EPA interpreted *Brendale* as finding no tribal jurisdiction where the proposed activities "would not threaten the Tribe's . . . health or welfare." *Brendale*, 492 U.S. at 432 (White, J., writing for the Court). EPA concluded that the best policy is to determine tribal authority over nonmember fee lands on a case-by-case basis, by examining potential threats against water quality as they relate to a particular Tribe's health or welfare. EPA noted that in *Brendale* the issue was zoning, whereas in water quality management it is easier to establish effects on tribal health and welfare. *Id.* at 64879.[7] Therefore, the EPA decided to require a showing from each tribal applicant "that the potential impacts of regulated activities on the tribe are serious and substantial." 56 Fed.Reg. at 64878.

In that 1991 rule, however, the EPA reserved to itself the opportunity to take into account environmental statutes and legislative findings regarding the seriousness of water pollution. *Id.* In making a factual finding of impact of a water-related activity on a particular tribe, the EPA

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[7] This is so because zoning impacts are normally discrete and localized, whereas water pollution creates environmental health risks that may affect many people miles from the source. When tribal members use surface water, or take fish or animal resources that use the surface water, pollution from non-Indian lands within the reservation could have a grave impact upon tribal health and environmental interests.

also relies on its special expertise and practical experience in the areas of water management and the impact of clean water on critical habitat. *Id.* The EPA notes that pollutants in surface waters are mobile by nature, and it is impractical to try to separate water quality impairment of tribal waters from impairments of non-Indian waters. *Id.* "EPA believes that a 'checkerboard' system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments." *Id.* In light of the importance of water quality management in protecting public health and safety, and in light of the mobile nature of water pollution, the EPA made a generalized finding that there is a relationship between water quality and tribal health and welfare.

The 1991 rule further determines that in order to meet the requisites of § 131.8, a tribe need only assert that there are waters in the reservation used by the tribe or tribal members, the waters are subject to protection under the CWA, and impairment of those waters by the activities of non-Indians would have a serious and substantial effect on the health and welfare of the Tribe. *Id.* at 64879. At that point, according to the EPA, a tribe has made an adequate showing of tribal jurisdiction over fee lands, and it is up to the competing governmental entity to demonstrate the tribe's lack of jurisdiction. *Id.* Presumably, the competing governmental entity would need to prove that impairment of tribal waters by the activities of non-Indians would not have a serious and substantial effect on the health and welfare of a tribe.

4. Legal Standards on Motion to Intervene.

(a) Intervention as of Right.

The four-part test for intervention as of right under Rule 24(a) is as follows:

> (1) The motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Sierra Club v. Environmental Protection Agency, 995 F.2d 1478, 1481 (9th Cir.1993). The proposed intervenor bears the burden of demonstrating that he is entitled to intervene under Rule 24. Petrol Stops *Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1010 n. 5 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 639 (1981).

(b) Permissive Intervention.

A court may exercise its discretion to grant permissive intervention when (1) the motion is timely, Rule 24(b); (2) the movant's claim or defense and the main action have a question of law or fact in common, Rule 24(b)(2); and (3) movant has an independent ground of jurisdiction to support permissive intervention. *See Greene v. United States*, 996 F.2d 973, 978 (9th Cir.1993); *see also* 3B Moore's Federal Practice, § 24.18. If proposed intervenors make these three showings, a court may then

utilize its discretion to determine the most fair and most efficient method of handling the case.

5. Discussion of Motion to Intervene.

The EPA Decision Document notes that tribal regulatory jurisdiction over non-members is not being determined for all purposes, but merely for the purpose of setting water quality standards for the Reservation under 40 C.F.R. § 131.8(a)(3). The EPA intends to continue issuing federal permits under section 402 of the CWA (NPDES), which the EPA will then enforce in federal court.

The Defendants contend that the proposed Plaintiff-Intervenors have no "significantly protectable" interest in this litigation. Proposed Plaintiff-Intervenors claim ten separate interests: (1) ownership of real property within the reservation; (2) ownership of water quantity rights within the Reservation; (3) ownership of a water use permit issued by the State of Montana and accompanying right to operate a reservoir within the Reservation; (4) attempted participation in the administrative process for the challenged decision; (5) participation in other litigation allegedly relating to the subject matter of this case; (6) interests in retaining constitutional rights; (7) interests in real property; (8) interests in prior acts of Congress interpreting tribal authority; (9) interest in maintaining JBC and the Districts as local governments; (10) interests in retaining the right to a trial by a jury of their peers for CWA civil violations and the right to participate in the administrative process by which the agency decision was reached.

However, the federal Defendants point out that the proposed intervenors have no special interest in the subject matter of this particular litigation – water quality standards of surface waters of the Flathead Indian Reservation. Because the proposed intervenors' sole interest lies in irrigation, they have no "significantly protectable" interest in this case. The federal Defendants inform the court that none of the proposed intervenors holds an NPDES permit which might potentially be modified due to any change in water quality standards imposed by the Tribes. Therefore, proposed intervenors are not in any way directly affected by the transfer of water quality standards authority from the State to the Tribes. Put another way, the transfer of the right to establish water quality standards from the State to the Tribes will have no immediate or any foreseeable, demonstrable effect upon the proposed intervenors.

In *Sierra Club v. Environmental Protection Agency*, 995 F.2d 1478, the Ninth Circuit concluded that the CWA protects the interest of a person who discharges pollutants pursuant to a NPDES permit, and held that an NPDES permit holder could intervene in a case which might result in stricter permit discharge limits. Here, none of the proposed Intervenors possess an NPDES permit or would in any demonstrable way be affected by the setting of water quality standards by the Tribes. Neither do any of the proposed Intervenors engage in any activity that is regulated by the CWA.[8] Proposed Intervenors' reliance on their possession of a water use permit

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[8] It is conceivable that one or more of the proposed Intervenors could be engaging in regulated activity. *See* 40 C.F.R. § 122.23 (requiring NPDES permit for Concentrated

relating to allocation of reservoir water is of no effect because it has no relationship to the CWA or the issues in this case.

Proposed Intervenors also cite *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir.1993), to support their intervention. However, that appellate panel ruled that certain counties and individuals should have been allowed to intervene in that litigation because their land would be directly affected by the Mille Lacs Band's right to enter their properties for the purposes of hunting and fishing. There is no such clear link in this case.

Proposed Intervenors assert that their interests are significantly protectable, and that the defendants have failed to adequately address their interests. Perhaps that is so because their interests are so vaguely stated. For example, proposed Intervenors assert that any expansion of governmental power by the Tribes causes their property values to drop; thus their purported property interest is in keeping tribal government small.[9] This general

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Animal Feeding Operations). *See also* Appendix B to Part 122, defining Concentrated Animal Feeding Operations as having more than 1,000 slaughter and feeder cattle, 700 mature dairy cattle (milked or dry), 2,500 swine, 500 horses, 10,000 sheep or lambs, etc., confined to a lot not having vegetative growth for at least 45 days per year. However, because none of the proposed Intervenors possesses an NPDES or asserts that he engages in any regulated activity requiring an NPDES permit, the court assumes that none of their farm and ranch operations meets the criteria for a Concentrated Animal Feeding Operation.

[9] Proposed Intervenors present the affidavit of Mr. Stelling, a certified real estate agent/broker and owner of a real estate firm in western Montana. Mr. Stelling concludes that "I am

concept may be accurate, but the interest is vague and attenuated, and there is no statute that entitles proposed Intervenors to bring such a claim.

Similarly vague and confusing is proposed Intervenors interest in protecting their right to trial by jury of their peers. This court cannot fathom what it is in this case that relates to the right to trial by jury of one's peers or in what way this right would be violated.

Proposed Intervenors state that they are also (in other litigation) challenging the Tribes' right to require them to obtain a permit from the Shoreline Protection Office of the Natural Resources Department of the Tribes pursuant to Tribal Ordinance 87A (the Aquatic Lands Conservation Ordinance ("ALCO")). *See Middlemist v. Pablo*, CV 95-68-M-CCL. Proposed Intervenors make the claim that the fact that they are litigating tribal jurisdiction over non-member lands in Middlemist should entitle them to intervene in this litigation. However, proposed Intervenors do not have any apparent interest in permitted discharges of pollutants regulated by the CWA. Furthermore, the EPA's finding of tribal jurisdiction over

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convinced that until and unless the issue of tribal jurisdiction over non-member property is resolved with a finding that they do not have such authority, property values will continue to be lower than comparable lands in other areas." (Stelling Aff., Exhibit 8, Mem.Supp.Interv.) It is apparent that proposed Intervenors believe that their land should have comparable values to off-reservation land. Standing alone, this claim for loss of property value tied to strength of tribal government does not suffice to support intervention as of right, and the cases cited by proposed Intervenors do not support the contention.

surface waters appurtenant to non-member lands is limited to the statutes and regulations in issue in this case.

This court finds that the proposed Intervenors have no significantly protectable interest in the outcome of this litigation and therefore are not entitled to intervene as of right.

As to permissive intervention, this court questions whether proposed Intervenors have any independent grounds of jurisdiction to support their permissive intervention. *See Greene v. United States*, 996 F.2d 973, 978 (9th Cir.1993) (requiring independent grounds of jurisdiction to support permissive intervention). The Administrative Procedures Act does not provide independent jurisdictional basis; it only prescribes standards for reviewing agency action once jurisdiction is otherwise established. *Staacke v. United States Secretary of Labor*, 841 F.2d 278 (9th Cir.1988). Proposed Intervenors have no statutory basis for suit pursuant to the CWA. *See Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1, 15-18, 101 S.Ct. 2615, 2623-25, 69 L.Ed.2d 435 (concluding that Congress intended that no private remedies be implied by the CWA in addition to those expressly provided). However, even if proposed intervenors could establish an independent ground of jurisdiction, this court would not be inclined to grant permissive intervention for the reason that such intervention would be likely to unduly delay or complicate the resolution of this case. Such an intervention would not lead to the fairest and most efficient handling of this case.

6. Cross Motions for Summary Judgment.

(a) Legal Standard.

A party is entitled to summary judgment in its favor if it can "show that there is no genuine issue as to any material fact and . . . [it] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment is particularly appropriate where, as here, review is on the administrative record. *Adams v. United States*, 318 F.2d 861, 865 (9th Cir.1963); *Denison v. Udall*, 248 F.Supp. 942, 944 (D.Ariz.1965) ("there should be no de novo review by this Court, but a determination that the final administrative decision is or is not substantially supported by the administrative record. Therefore, a summary judgment pursuant to [Fed.R.Civ.P. 56] may be granted for either party in response to their cross motions"). *See also Florida Fruit & Vegetable Ass'n v. Brock*, 771 F.2d 1455, 1459 (11th Cir.1985), *cert. denied*, 475 U.S. 1112, 106 S.Ct. 1524, 89 L.Ed.2d 921 (1986) (Summary judgment procedure is "particularly appropriate" in record review cases) (quoting 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2733 (1983)).

(b) Discussion.

The focus of the cross motions for summary judgment is whether the EPA properly interpreted *Montana* and *Brendale* when it concluded that the Tribes could meet the second *Montana* exception. The Plaintiffs assert that the *Montana* test has given way to an open-closed area analysis first enunciated in *Brendale* and repeated in *South Dakota v. Bourland*, 508 U.S. 679, 113 S.Ct. 2309, 124

L.Ed.2d 606 (1993). The parties are in agreement that this court must subject EPA's interpretation of case law to de novo review. *See Arizona Pub. Serv. Co. v. Aspaas*, 69 F.3d 1026, 1031 (9th Cir.1995).

However, in reviewing the final EPA action, this court may not make a de novo determination. Instead, this court must determine whether the EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971); *Rybachek v. Environmental Protection Agency*, 904 F.2d 1276, 1284 (9th Cir.1990). This court's function is to ensure that the agency considered all of the relevant factors and that its decision contained no 'clear error of judgment.' " *Arizona v. Thomas*, 824 F.2d 745, 748 (9th Cir.1987) (citation omitted). This court need not determine that the EPA's construction of the CWA is the only construction possible; instead, this court must determine that EPA's understanding of this CWA provision is sufficiently rational as to preclude this court from substituting its judgment for that of EPA. *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125, 105 S.Ct. 1102, 1107-08, 84 L.Ed.2d 90 (1985). Finally, "[a]n agency's interpretation of its own regulations is entitled to a high degree of deference and will be upheld as long as it is not plainly erroneous or inconsistent with the regulation." *Washington State Health Facilities v. DSHS*, 879 F.2d 677, 681 (9th Cir.1989) (*citing United States v. Larionoff*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977)).

The *Montana* test has been previously applied with regard to civil regulatory jurisdiction of the Tribes over

nonmember lands on the Flathead Reservation. For example, in *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 964 (9th Cir.), *cert. denied*, 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed.2d 291 (1982), a Ninth Circuit panel determined that the Tribes' regulation of nonmember property bordering Flathead Lake under a shoreline protection ordinance was a permissible exercise of tribal authority under second *Montana* exception because there was a potentiality [sic] for serious impacts on the water quality of the lake.

The EPA analyzed relevant case law, including *Montana* and *Brendale*, and determined that the *Montana* test is still utilized by the United States Supreme Court in evaluating tribal regulatory jurisdiction over nonmember lands. The EPA declined to interpret section 518(e) as a direct grant of regulatory authority to tribes, although there are some who do interpret section 518(e) in that fashion.[10] Instead, the EPA determined that it would examine tribal authority on a case-by-case basis. In the case of the Tribes, the EPA found sufficient facts to support the Tribes' claim that pollution of the surface waters traversing or appurtenant to non-member land would have serious and substantial impact on the Tribes' health and welfare. Such fact finding by the EPA is entitled to substantial deference. *Arkansas v. Oklahoma*, 503 U.S. 91, 112, 112 S.Ct. 1046, 1060, 117 L.Ed.2d 239 (1992); *Central Arizona Water Cons. Dist. v. Environmental Protection Agency*, 990 F.2d 1531, 1539-40 (9th Cir.), *cert. denied*, 510

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[10] *See* 56 Fed.Reg. 64879-80. *See also* Brief Amicus Curiae of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana.

U.S. 828, 114 S.Ct. 94, 126 L.Ed.2d 61 (1993). Even if alternative findings could be supported by the administrative record, the EPA's factual findings should be upheld if they are supported by the administrative record. *Arkansas v. Oklahoma*, 503 U.S. at 112, 112 S.Ct. at 1060.

Nevertheless, Plaintiffs assert that the EPA' reading of *Montana* and *Brendale* leads to an erroneous legal determination that the Tribes possess inherent regulatory jurisdiction over nonmember lands within the Reservation. Their reading of *Brendale* and *Bourland*,[11] in particular, leads them to the conclusion that inherent tribal jurisdiction exists only when there is a vacuum of state or federal remedies. However, both *Brendale* and *Bourland* support the continuing validity of the *Montana* test, and in *Brendale* the Supreme Court used the *Montana* test to determine that the tribe did have regulatory jurisdiction over the the [sic] *Brendale* property. Three Justices in *Brendale* supported the continued use of the *Montana* test. 492 U.S.

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[11] *South Dakota v. Bourland*, 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993). In *Bourland*, the Cheyenne River Sioux Tribe sought to regulate hunting and fishing activities of non-Indians on the Oahe Reservoir, a federal facility within the exterior boundaries of their reservation. The opinion cites *Montana's* general rule that the opening of Indian lands causes a tribe to lose its treaty-based right to regulate non-Indian activities. However, *Bourland* also goes on to cite the *Montana* exception allowing for regulation of activities that threaten or directly impact the political integrity, economic security, or health and welfare of the tribe. Finally, the *Bourland* opinion remanded the case back to the circuit court for review of the district court's findings regarding the impact of non-Indian activities on tribal health and welfare.

at 462, 109 S.Ct. at 3024 (Opinion of Blackmun, J.). Four other Justices support the use of a modified *Montana* test that would require the tribe to show that there would be "demonstrably serious impacts" on the tribe. *Id.* at 428-32, 109 S.Ct. at 3006-09 (Opinion of White, J.).[12] Only two Justices advocated distinguishing between open and closed areas. *Id.* at 440-44, 109 S.Ct. at 3013-15. (Opinion of Stevens, J.).

The Supreme Court subsequently considered *Brendale* in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 266-67, 112 S.Ct. 683, 692-93, 116 L.Ed.2d 687 (1992), and stated that Justice White's opinion (requiring "demonstrably serious impacts") is consistent with the test enunciated in *Montana*. Because Justice White's opinion in *Brendale* essentially set a stricter standard for the *Montana* test, EPA determined that it would apply that stricter standard to any tribe applying for TAS status.

The EPA also made several generalized findings in its regulations:

> 1. The CWA constitutes a congressional finding that impacts to water quality give rise to impacts to human health and welfare.
>
> 2. Water quality standards must take into consideration public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes.

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[12] It is noteworthy that Justice White cites TAS status under the CWA as providing an example of an express Congressional delegation of tribal regulatory authority over non-Indian lands. *Brendale*, 492 U.S. at 428, 109 S.Ct. at 3006-07.

3. Because of the mobile nature of pollutants, it is impractical to regulate stream segments according to the member/nonmember checkerboard.

EPA's expertise and experience in making these determinations is not to be treated lightly. Also, the EPA's environmental regulatory policy is to avoid administrative complexity such as checkerboarding and fractionalizing of reservations into trust and fee lands. This regulatory policy serves as a foundation for EPA's Indian policy, which calls for a lead role for tribal governments in managing programs to protect the reservation environment and its populace. *See* EPA Policy for the Administration of Environmental Programs on Indian Reservations, (Nov. 8, 1984). This court should defer to the EPA's expertise and experience when it reconciles its environmental policy with its Indian policy. *State of Wash., Dept. of Ecology v. EPA*, 752 F.2d 1465, 1469 (deferring to EPA' reconciliation of environmental policy and Indian policy in finding that states lack authority to administer Resource Conservation and Recovery Act on Indian reservation).

The EPA also made a specific finding as to the Tribes' inherent jurisdiction over surface waters traversing or appurtenant to nonmember lands within the Reservation. The EPA affirmed that the Tribes require clean water for a domestic water supply and to maintain fish, aquatic life and other wildlife for both subsistence and cultural reasons. Because the Tribes had explicitly asserted that impairment of tribal waters by activities of non-members would have a serious and substantial effect on the health and welfare of the Tribes, and because that assertion corresponded to the EPA's generalized findings, the EPA

found that the Tribes' possess inherent authority to set water quality standards for all surface waters within the Reservation. The EPA also found that the State failed to demonstrate that such authority was lacking. The EPA's finding was also based upon numerous instances of regulated activities occurring on nonmember lands that caused serious and substantial impacts of the Tribes' water resources, including discharges from an RV park and campground, discharges from sewage treatment plants, discharges from a town's storm drains, leakage from gasoline service stations, diesel fuel spills, and gas tank overflows.

7. Conclusion.

On the basis of the foregoing description of the EPA's reasoning and findings, and after careful consideration of the arguments of the parties and review of the administrative record, this court finds that the EPA's final decision is supported by the administrative record, consistent with EPA's regulations, and not contrary to law, and should be upheld. Accordingly,

IT IS HEREBY ORDERED:

1. Proposed Intervenor's motion for leave to file memorandum of supplemental authorities (Docket #30) is GRANTED.

2. Defendant Tribes' motion for summary judgment (Docket #47) and Defendant EPA's motion for summary judgment (Docket #43) are GRANTED.

3. Plaintiffs' motion for summary judgment (Docket #45) is DENIED.

4. Defendant Tribes' motion to strike initial brief of intervenor and motion for summary judgment (Docket #47) is GRANTED.

5. Defendant Tribes' motion for leave to file errata to brief in support of Tribes' motion for summary judgment (Docket #53) is GRANTED.

6. Proposed Intervenors' motion for leave to file response brief to initial briefs (Docket #57) is DENIED.

7. Proposed Intervenors' motion for leave to file reply brief and initial brief nunc pro tunc (Docket #64) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' complaint is DISMISSED and all relief is denied.

The Clerk is directed forthwith to notify the parties and the proposed Intervenors of entry of this order.

(Logo) UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION VIII
999 18th STREET - SUITE 500
DENVER, COLORADO 80202-2466

FEB 27 1995

Ref: 8WM-WQ

Michael Pablo, Chairman
Confederated Salish and Kootenai Tribal Council
P.O. Box 278
Pablo, MT 59855

Dear Chairman Pablo:

I am pleased to inform you that the Agency approves the Confederated Salish and Kootenai Tribes' (CSKT) application to administer a Clean Water Act (CWA) § 303(c) water quality standards program. Our approval is based on the Agency's determination that the Tribes meet the criteria for program approval found at 40 CFR 131.8(a). Please note that the scope of our approval is limited to administration of a CWA § 303(c) water quality standards program within the exterior boundaries of the Flathead reservation (i.e. all lands including non-Indian owned lands). Pursuant to the federal water quality standards regulation at 40 CFR 131.4(c), one additional effect of our approval is that the CSKT may also issue water quality certifications consistent with CWA § 401. This approval does not provide any additional implementation authorities (e.g. permitting, enforcement) beyond the water quality standards and water quality certification programs.

In approving the Tribes § 303(c) Application, we recognize that the State of Montana has raised concerns of due process and participation of the non-Indian community within the Reservation in water quality matters that affect them. We are pleased that in your June 13, 1994 correspondence with Governor Racicot and during our December, 1994 meeting with EPA Assistant Administrator for Water, Robert Perciasepe, you expressed strong interest in developing a cooperative agreement that recognizes this concern. Such an agreement would recognize at the outset the CSKT authority to set water quality standards and is consistent with the way in which you provided joint Indian and non-Indian representation to implement shoreline management of Flathead Lake. I appreciate your willingness and commitment to develop a program which responds to concerns regarding participation of non-Indian peoples within the reservation.

EPA looks forward to working with the Confederated Salish and Kootenai Tribes in the development, adoption, and triennial review of water quality standards for surface waters of the Flathead reservation. EPA also commends the Tribes for the commitment to the environment that is demonstrated by the Tribes' existing water quality program and your fine professional staff.

If you have questions regarding the water quality standards program please feel free to contact Dr. Robert Erickson at (303) 293-1566 or Bill Wuerthele, EPA Region VIII Water Quality Standards Coordinator, at (303)

293-1586. I thank you for your cooperation and patience in this matter.

Sincerely,

/s/ William P. Yellowtail
William P. Yellowtail
Regional Administrator

cc: Sam Morigeau, Director, CSKT Natural Resources Department

DECISION DOCUMENT:
APPROVAL OF CONFEDERATED SALISH AND KOOTENAI TRIBES
APPLICATION FOR TREATMENT AS A STATE
UNDER SECTION 303 OF THE CLEAN WATER ACT

TABLE OF CONTENTS

I. Introduction

A. Purpose

B. Application

C. Chronology of events

II. Requirements for TAS Approval.

A. Federal recognition

B. Substantial governmental duties and powers

C. Jurisdiction over "waters within the borders" of the Flathead Reservation

D. Capability

III. Conclusions

IV. Appendix. Factual Analysis of Finding: Existing and future activities on non-member owned fee lands within the exterior borders of the Flathead Reservation have potential direct impacts on the health and welfare of the Tribes and tribal members that are serious and substantial.

A. Basis for Finding

1. Relationship of water quality and beneficial uses to the health and welfare of the Tribes and tribal members.

2. Relationship of tribal lands to fee lands and tribal waters.

3. Kinds of water quality degradation that originate on fee lands and have potential impacts on tribal waters that are serious and substantial.

4. Examples of actions originating on fee lands that have potential impacts on the water quality and beneficial uses of tribal waters that are serious and substantial.

5. Beneficial uses that may not be protected.

6. Degradation of tribal waters.

B. Finding

I. *Introduction*

A. **Purpose:** The purpose of the Decision Document is to provide the basis and supporting information for EPA's decision to approve the April 22, 1992 Treatment as a State (TAS) Application of the Confederated Salish and Kootenai Tribes (Tribes) to administer Section 303(c) (Water Quality Standards program) of the Clean Water Act (CWA). The approval applies to the administration of the water quality standards program for waters that lie within the exterior borders of the Flathead Reservation.

B. **Application:** The Tribes' Application for Treatment as a State under Section 303 of the CWA consists of three documents:

1) the Tribe's 303 application, dated April 22, 1992;

2) pages 47 through 85 of Volume I of the Tribes Application for Treatment as a State under Section 404 of the CWA, dated June 22, 1990, and incorporated by reference into the Tribe's 303 application; and

3) an Addendum to the Confederated Salish and Kootenai Tribe's Application for Treatment as a State under Section 303 and 404 of the CWA, dated July 13, 1993.

C. **Chronology of Events**

1. June 22, 1990 – Application for Treatment as a State under Section 404 by the Confederated Salish and Kootenai Tribes.

2. April 22, 1992 – Application for Treatment as a State under Section 303 by the Confederated Salish and Kootenai Tribes.

3. July 13, 1992 – Addendum to Confederated Salish and Kootenai Tribes Application for Treatment as a State under Sections 303 and 404 of the CWA.

4. July 27, 1993 – Letter from Region VIII Acting Administrator Jack McGraw to Michael T. Pablo, Chairman, Confederated Salish and Kootenai Tribes. Application for Treatment as a State under CWA Section 303 considered by EPA to be complete insofar as all required elements are included.

5. July 27, 1993 – Letters to "Appropriate federal entities" from Acting Region VIII Administrator, Jack McGraw:

   a. U.S. Corps of Engineers (US COE), Omaha, Nebraska

b. Flathead National Forest (USFS)

c. Area Director, Bureau of Indian Affairs (US BIA)

d. Supervisor, Lolo National Forest (USFS)

e. State Supervisor, Montana State Office, U.S. Fish and Wildlife Service (US FWS)

6. August 17-September 9 – Responses from "Appropriate federal entities" to Jack McGraw, Acting Region VIII Administrator.

   a. August 17, 1993 – USFS Response, Lolo National Forest

   b. September 23, 1993 – Flathead National Forest

   c. August 19 and September 2, 1993 – COE Response

   d. September 9, 1993 – USFWS Response

7. August 20-22, 1993 – Publication of Notice for Confederated Salish and Kootenai Tribes Application to be treated as a state for purposes of Section 303 of the CWA (*The Missoulian*, Missoula, Montana).

8. September 16, 1993 – Response by State of Montana to Application for Treatment as a State by the Confederated Salish and Kootenai Tribes to Jack McGraw, Acting Regional Administrator, Region VIII. (Included comments from the public.)

9. September 27, 1993 – Letter from Region VIII Acting Administrator Jack McGraw to the Honorable Marc Racicot, Governor, State of Montana, regarding Confederated Salish and Kootenai Treatment as a State under Section 303 of the CWA.

10. November 9, 1993 – Letter to Bob Erickson, Region VIII, Water Quality Branch, from Rhonda Swaney, Natural Resources Dept. Head, The Confederated Salish and Kootenai Tribes. Submission of Draft Flathead Reservation Water Quality Standards and request for technical review.

II. *Requirements for TAS Approval:* Under Section 518(e) of the CWA and EPA's implementing regulation at 40 CFR Section 131.8 four requirements must be satisfied before EPA can approve a tribe's application to administer a water quality standards program under Section 303(c). These are: (1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in Section 131.3(k) and (1); (2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers; (3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the border of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and (4) The Indian Tribe is reasonably expected to be capable, in the Regional

Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

A. **Federal Recognition:** The Confederated Salish and Kootenai Tribes are a recognized tribe by the U.S. Department of the Interior (58 Fed. Reg. 54364, 54366, October 21, 1993).

B. **Substantial governmental duties and powers:** Analysis under 40 C.F.R. Section 131.8(a)(2). The Agency is satisfied that the Salish and Kootenai Tribes (Tribes) of the Flathead Reservation have a tribal Government currently carrying out substantial governmental duties and powers over a defined area and that the Tribes have met the requirements imposed by 40 C.F.R. Section 131.8(a)(2) for treatment as a state under Section 303 of the CWA (CWA).

Background: 40 C.F.R. Section 131.8(a)(2) requires that the "Indian Tribe has a governing body carrying out substantial governmental duties and powers."

The Tribes' descriptive statement demonstrating that the tribal governing body is currently carrying out substantial governmental duties and powers over a defined area is found at pages 47 through 85 of Volume I of the Tribes' Application for treatment as a state under Section 404, dated June 22, 1990, incorporated by reference into Volume I of the Tribes' Application for treatment as a state under Section 303, dated April 22, 1992.

The Statement adequately: (1) describes the form of tribal government; (2) describes the

types of governmental functions currently performed by the tribal governing body; and (3) identifies the source of the tribal government's authority to carry out the governmental functions currently being performed.

The tribal Government was organized pursuant to the Indian Reorganization Act in 1935, with its governmental functions conducted in accordance with the powers and duties delineated in the tribal Constitution. The tribal Government and its departments engage in a variety of governmental functions, from natural resources to human resources. These are described in detail in the exhibits to Volume I of the Tribes' 404 Application, with additional descriptive information contained in Volume I of the Tribes' 303 Application, referenced above.

In addition, it should be noted that the Tribes previously received approval on September 25, 1989 for treatment as a state under Section 106 of the CWA, at which time the Agency made a determination that the Tribes have "a governing body carrying out substantial governmental duties and powers."

C. **Jurisdiction over "waters within the borders" of the Flathead Reservation:** Analysis under 40 C.F.R. Section 131.8(a)(3).

The Agency is satisfied that the Salish and Kootenai Tribes (Tribes) of the Flathead Reservation have adequate jurisdiction to set water quality standards for waters within the exterior boundaries of the Reservation and have adequately demonstrated that they meet the requirements imposed by 40 C.F.R. Section

131.8(a)(3) for treatment as a state under Section 303 of the CWA (CWA).

Background: 40 C.F.R. Section 131.8(a)(3) requires that "the water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are . . . within the borders of the Indian reservation." The program for which the Tribes are applying pertains to the management and protection of water resources which are within the borders of the Flathead Reservation, and this approval is limited to waters within the borders of the Reservation.

It should be noted that EPA is not today determining the scope of the Tribes' regulatory enforcement authority for all purposes. EPA is today finding that the Tribes have sufficient authority to determine the water quality standards for the Reservation. While the Tribes may, in an independent action, enforce tribal water quality standards, an EPA approved water quality standards program need not be implemented through enforcement in tribal court. For example, EPA may issue federal permits under Section 402 of the CWA, based upon tribal water quality standards. Such permits would then be enforced in federal court.

The Tribes' assertion of civil regulatory jurisdiction within the Flathead Reservation is contained in three documents: (a) Volume I of the Tribes' application for treatment as a state under Section 303, dated April 22, 1992, (b) Volume I of the Tribes' 404 Application, dated June 22, 1990, at pages 47 through 85, incorporated by reference into document (a), above,

and, (c) Addendum to Confederated Salish and Kootenai Tribes Application for Treatment as a State under Sections 303 and 404 of the CWA, July 13, 1993.

These documents were forwarded to the U.S. Forest Service (USFS), the U.S. Army Corps of Engineers (COE), the U.S. Fish and Wildlife Service (USFWS), the Bureau of Indian Affairs (BIA) and the State of Montana for comment on the Tribes' jurisdictional assertions, pursuant to 40 C.F.R. Section 131.8(c)(2). These entities responded on August 17 and September 23, 1993 (USFS), August 19 and September 2, 1993 (COE), September 9, 1993 (USFWS), and September 16, 1993 (State of Montana). As the State of Montana raised a competing or conflicting claim, the Region 8 Office of Regional Counsel and the Office of General Counsel consulted by telephone with the Office of the Solicitor of the Department of the Interior (DOI) on January 24, 1994 and May 31, 1994, pursuant to 40 C.F.R. Section 131.8(c)(4).

The Montana Operations Office of EPA Region 8 also published a local newspaper notice of the Tribes' application, inviting the public to submit comments through the State of Montana. Numerous public comments were received by EPA as attachments to the State's letter of September 16, 1993, and the public comments were duly considered by the Agency before reaching this decision.

Tribal Jurisdiction: Having reviewed the jurisdictional assertions of the Tribes and the comments received from other Federal Agencies and the State of Montana (including public comments), and having consulted with DOI,

the Agency has determined that the Tribes have demonstrated adequate jurisdiction to establish water quality standards within the exterior boundaries of the Flathead Reservation.

Tribal authority over Reservation lands other than fee lands owned by non-tribal members. With regard to Reservation lands other than fee lands owned by non-tribal members, the Agency agrees with the Salish and Kootenai Tribes that under well-established principles of Federal Indian law, the Tribes have inherent authority to establish water quality standards. Indeed, the State of Montana only contests the Tribes' assertion of authority over fee lands.

Tribal authority over Reservation lands owned in fee by non-tribal members.

Standard: In the preamble to the amendments to the Water Quality Standards Regulation, published on December 12, 1991 at 56 Fed. Reg. 64876, the Agency set forth its analysis of the scope of inherent tribal authority over reservation lands owned in fee by nonmembers. In that discussion, the Agency considered relevant case law, including *Montana v. United States,* 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Nation,* 492 U.S. 408 (1989), and elected to adopt an interim operating rule" (56 Fed. Reg. at 64878-79) for determining, on a case by case basis, whether an Indian Tribe has authority over reservation lands owned in fee by nonmembers (fee lands).

The operating rule is based on the finding in *Montana* that "a tribe may also retain inherent

power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66. The operating rule requires a further showing that the "potential impacts of regulated activities on the tribe are serious and substantial." 56 Fed. Reg. at 64878.

The State of Montana's comments did not provide data pertaining to the Tribes' assertions that impairment of waters on reservation fee lands may have effects on the health and welfare of the Tribes that are serious and substantial. Since the Tribes' submittal met the initial requirements imposed on them by the regulation, the State submittal should have presented any available data demonstrating that impairment of waters by activities on fee lands would not have potential effects on the health and welfare of the Tribes that are serious and substantial. 56 Fed. Reg. 64879. EPA carefully evaluated the State's submission and determined that the State did not provide information that would cause the Agency to conclude that the Tribes' assertions were unsupported.

The State contended that it had no opportunity to submit facts contesting the Tribes' assertion. However, as provided by the regulation, the State was provided notice as to the substance of the Tribes' assertion of authority and was given thirty days within which to submit information sufficient to establish a competing

or conflicting claim under the applicable regulation. 40 CFR Section 131.8(c)(2)-(4). The State did not submit such information.

Accordingly, having considered the arguments the State submitted, and having consulted with DOI on these questions, EPA has concluded: 1) that the Tribes have demonstrated that they possess the requisite regulatory jurisdiction, and 2) that the State has not established that the Tribes lack jurisdiction.

The State also asserts that the jurisdictional test established in the preamble to the regulation is not proper. EPA, having consulted with DOI, does not agree.

The State's position is that EPA should apply the general rule established in *Montana v. United States,* 450 U.S. 544 (1981), that the Tribes lack jurisdiction on fee lands and the exceptions to that rule apply only in "narrow, fact-based circumstances." In fact, EPA's operating rule, established and discussed at 56 Fed. Reg. 64878-79, was based upon the principles set forth in the *Montana* case. In adopting its operating rule, the Agency reviewed the Supreme Court's decision in *Brendale v. Confederated Bands and Tribes of the Yakima Nation,* 492 U.S. 408 (1989) and determined that the holding of the Court in *Brendale* was consistent with the *Montana* test. In the subsequent Supreme Court opinion in *South Dakota v. Bourland,* 508 U.S., 113 S. Ct. 2309 (1993), the Court remanded a portion of the case pertaining to jurisdiction over nonmember activities on fee lands to the District court for consideration under the *Montana* rule. The Agency

believes that the *Bourland* opinion is thus consistent with the Court's *Montana* and *Brendale* decisions and with the Agency's 1991 analysis. The Agency also believes that the exceptions to the *Montana* rule, allowing tribal jurisdiction where there is potential for direct impacts on tribal health and welfare, are appropriately applied in this case. In addition, it should be noted that the Agency operating rule asks Tribes to show that the impacts required by the *Montana* rule be more than *de minimis;* in fact, the Agency rule asks, and the Tribes have demonstrated, that these impacts be "serious and substantial."

The Tribes also contend that the CWA delegates authority for approved Tribes to regulate water quality for all sources within the exterior boundaries of the Reservation and that the CWA preempts the State from regulating water quality within the Reservation. The Tribes' position is based on language in the Act authorizing approval of a tribal program for functions "within the borders of an Indian reservation," 33 U.S.C. Section 1377(e)(2), and defining a Reservation as "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." 33 U.S.C. Section 1377(h)(1).

EPA regulations governing reservation water quality standards do not construe the CWA as delegating authority to Tribes over all reservation sources, or as preempting State regulation. 56 Fed. Reg. 64880. Nevertheless those regulations do explicitly request each Tribe "to outline all bases for concluding that the Tribe has adequate authority" to set water quality

standards on the reservation, noting that such a discussion "can only help EPA to make a proper determination" as to the appropriateness of approving the tribal water quality standards program. 56 Fed. Reg. 64881. The portion of the tribal submission discussing delegation and preemption complies with the Agency's explicit request in this regard, and is therefore appropriate for consideration. To the extent the Tribes' position is correct, it would provide support for EPA's determination.

Finding: EPA finds that existing and future activities on fee lands within the exterior borders of the Flathead Reservation having potential direct impacts on the health and welfare of the Tribes and tribal members that are serious and substantial. The facts upon which the Agency has based this finding are set forth in the Appendix.

In making its finding, the Agency has relied on its special expertise and practical experience regarding the importance of water management, recognizing that clean water, including critical habitat (i.e., wetlands, spawning beds, etc.) may be crucial to the survival of the Flathead Reservation.

Based upon its special expertise and practical experience, the Agency also believes that the activities regulated under the CWA generally have impacts on human health and welfare that are serious and substantial. As discussed at 56 Fed. Reg. 64878, this finding is consistent with our belief that the CWA itself constitutes, in effect, a legislative determination that activities which affect surface water quality and critical habitat quality may have impacts on

human health and welfare that are serious and substantial.

Additionally, the Agency is mindful that, because of the mobile nature of pollutants in surface waters and the relatively close proximity of stream segments and lake waters on fee and trust lands within the Flathead Reservation, it would be practically very difficult to separate out the effects of water quality impairment on fee lands within the Reservation from those on tribal portions. In other words, it is highly probable that any impairment occurring on, or resulting from activities on, fee lands will impair the water and critical habitat quality of the tribal lands. Similarly, the serious and substantial effects of water quality impairment within the non-member portions of the Reservation are very likely to affect the tribal interest in water quality.

EPA also believes that Congress has expressed a preference for tribal regulation of surface water quality to assure compliance with the goals of the CWA (*see* 56 Fed. Reg. at 64878-79). EPA interprets Section 518 of the CWA, in providing for the treatment of Indian Tribes as States under Section 303 of the Act, as authorizing Tribes to assume a primary role in setting water quality standards on reservations. A checkerboard system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities establish standards for closely intermixed stream segments. 56 Fed. Reg. 64878.

The generalized findings regarding the relationship of water quality to tribal health and welfare affect the legal analysis of the Tribes' submission by, in effect, supplementing the Agency's factual findings contained in the Appendix. In accordance with 56 Fed. Reg. at 64879, the Tribes have made a showing of facts that there are waters within the Reservation used by the Tribes or tribal members (and thus that the Tribes or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat of the Reservation are subject to protection under the CWA. The Tribes have also asserted that impairment of such waters by the activities of nonmembers would have an effect on the health and welfare of the Tribes that is serious and substantial. Based upon the facts available to the Agency from the Tribes and other sources, as presented in the Appendix, and in light of the generalized statutory and factual findings discussed above, the Agency believes that the Tribes have demonstrated that the protection of water quality sought to be carried out by setting water quality standards for water on fee lands on the Flathead Reservation would protect against potential impacts on tribal health and welfare that are serious and substantial.

Thus, the Agency believes that the Tribes have successfully demonstrated adequate authority to establish water quality standards within the Flathead Reservation and that the Tribes have met the requirements of 40 C.F.R. Section 131.8(a)(3).

D. **Capability:** The Confederated Salish and Kootenai Tribes have demonstrated that they are reasonably capable of establishing and implementing a water quality standards program that will comport with the requirements of the CWA. In determining that the Tribes have the capability to establish and implement an adequate water quality standards program, the Agency considered that the tribes:

1. Have developed and staffed a Natural Resources Department which has the legal authority to carry out the mission of the water quality standards program;
2. Having enacted the Water Quality Management Ordinance (89-B, Title I of the Tribal Water Code) to ensure that, "the quality of the water resources of the Flathead Reservation be protected, restored and maintained in conformance with the tribal Administrative Procedures Ordinance S6B, May 24, 1991; and
3. Have drafted interim water quality standards regulations that have been informally reviewed by EPA. These standards include the CWA basic requirements of identifying and designating beneficial uses for tribal waterbodies, identifying water quality criteria to protect those beneficial uses, and a policy on antidegradation.

Details are provided in Volume II of the Section 303 TAS application. Following a review of the materials in Volumes I and II of the Application for TAS, the Agency concluded that the Tribes had demonstrated capability. (Reference: Memo to

File from Bob Erickson, Application of the Confederated Salish and Kootenai Tribes of the Flathead Nation for Treatment as a State for purposes of the establishment and implementation of a water quality standards program.)

III. *Conclusions:* The Agency has determined that the Confederated Salish and Kootenai Tribes of the Flathead Reservation have met the requirements of 40 CFR Section 131.8 and are eligible to be treated as a state for purposes of Section 303(c) of the CWA.

/s/ William P. Yellowtail
William P. Yellowtail 2/27/95
Regional Administrator
EPA Region 8

Appendix

Factual Analysis of Finding: Existing and future activities on non-member owned fee lands within the exterior borders of the Flathead Reservation have potential direct impacts on the health and welfare of the Tribes and tribal members that are serious and substantial.

A. Basis for Finding

The following information is organized to develop and present evidence showing the relationship between activities originating on non-member owned fee lands (fee lands) and impairment of water quality and beneficial uses. The first four headings discuss:

1. How water quality and beneficial uses affect the health and welfare of the Tribe;
2. How tribal and fee lands are related to tribal waters;
3. The general kinds of water quality degradation which originate on fee lands and influence tribal waters; and
4. Specific examples of actions that originate on fee lands which have the potential to impair water quality and beneficial uses of tribal waters.

This is followed by a discussion of:

5. Tribal beneficial uses that may not be protected by State standards; and
6. State/tribal antidegradation differences that have potential impacts on welfare of the Tribes that are serious and substantial.

1. Relationship of water quality and beneficial uses to the health and welfare of the Tribes and tribal members.

The Federal Water Pollution Control Act (CWA) of 1972 and subsequent amendments call for the maintenance and restoration of the physical, chemical and biological integrity of our nation's waters. The quality of water above and within the stream or lake bed and the quality of the stream or lake beds themselves have a direct effect on this goal.

The integrity of our nation's waters is directly related to water quality standards that are intended to assure the full protection of all existing uses and designated uses identified by States and Tribes. Beneficial uses typically

include, but are not restricted to, domestic water supply, fish and aquatic life, recreation in and on the water, wildlife, agriculture, industrial and navigation uses. Water quality standards that provide full protection of beneficial uses affect tribal health and welfare in the following ways:

- The full protection of domestic water supplies ensures that human health will be directly protected from disease and from exposure to toxic materials at acute or chronic levels as a result of exposure through drinking water uses. This protection is basic to the health and welfare of tribal members;

- The full protection of fish and other aquatic life assures that aquatic ecosystems will function to cycle energy, to aid in the detoxification of contaminants and to provide the diversity and productivity of life within tribal waters. These functions, in turn, enable aesthetic, educational/scientific, recreational, and good goals of the Tribes to be achieved and directly affect the welfare of the Tribe. The full protection of the aquatic life use also helps ensure the economic well being of the Tribes and tribal members through harvest of fish and other aquatic life and encouragement of water-based recreation businesses;

- The full protection of recreation in and on the water affects tribal welfare by allowing tribal and non-tribal citizens the recreational use of waters for body contact during play and sport without undue threat of disease or loss of aesthetic pleasure. The economic well being of the Tribes and tribal members is enhanced through harvest of aquatic life and

encouragement of ecological and water-based recreation;

- The full protection of wildlife uses helps assure that birds, mammals, reptiles, and amphibians that use and depend upon tribal waters as a source of water, food, or habitat will maintain the species diversity and productivity that tribal lands and waters are capable of supporting. Protection of the wildlife use also protects the health of tribal members from toxins that can accumulate in wildlife and be passed to humans. In addition, protection of the wildlife use helps ensure the economic well being of the Tribes through providing ecological and water-based recreation;
- The full protection of agricultural uses helps assure the economic welfare of the Tribes through protection of crops and assures protection of the health of tribal members through control of contaminants that enter crops through irrigation from tribal waters;
- The full protection of industrial and navigation uses helps assure the economic welfare of the Tribes through control of contaminants that may be costly to industrial or navigation uses through corrosion or interference with industrial processes.

2. Relationship of tribal lands to fee lands and tribal waters.

The attached map shows the types of land ownership that exists within the Flathead Reservation. Tribal and Indian-owned fee lands are estimated to include 54-58%

of the area within the boundary, including Flathead Lake itself (personal communication, CSKT, Natural Resources Dept). The Tribes consider all waters within the exterior boundaries to be waters of the Flathead Reservation.

Tribal lands include most of the headwater streams and lakes on the western, eastern and southern borders of the Reservation. In addition, lands surrounding the Flathead River, lands to the east of Flathead Lake, and smaller parcels scattered between fee lands are tribal lands. The majority of the central valley area is in fee land.

The reservation is drained by five major watersheds and two lesser ones. The major watersheds are the Flathead, Jocko, and Little Bitterroot Rivers and Mission and Crow Creeks.

- The largest river, the Flathead River below Flathead Lake, is surrounded by tribal lands, but much of the drainage to the river is from fee lands. All of the other major systems drain into the Flathead River within the Reservation.

- The Jocko River drains most of the south-east portion of the Reservation. It is surrounded primarily by fee lands in the low-lying areas and enters the Flathead River near the National Bison Range.

- The Little Bitterroot River drains the largest land area within the Reservation, covering the north-west and central portion of the Reservation. Most of this river flows through fee lands and enters the Flathead River a few miles upstream of Crow Creek.

- Mission Creek drains the eastern portion of the Reservation, flows through the northern portion of the National Bison Range (federal land) and enters the Flathead River 2-3 miles upstream of the Jocko River confluence. Most of this drainage flows through fee lands.

- The Crow Creek basin lies just to the north of Post Creek and drains the central-eastern portion of the Reservation. Most of the drainage flows through fee lands and enters the Flathead River approximately in the center of the Reservation.

3. **Kinds of water quality degradation that originate on fee lands and have potential impacts on tribal health and welfare that are serious and substantial.**

Specific examples of water quality effects originating on fee lands are provided later in this Appendix. The following provides a basis for assessing the significance of these specific examples by describing the kinds of water quality impacts and their potential effects on beneficial uses. (EPA does not imply that these effects are only limited to actions originating on fee lands.) EPA believes that the kinds of water quality degradation that result from activities on fee lands can adversely affect beneficial uses and therefore have potential impacts on tribal health and welfare that are serious and substantial. Establishment of water quality standards for all waters on the reservation enables the Tribe to set appropriate water quality goals to aid in avoiding these potential impacts.

Degradation of water quality as a result of activities originating on fee lands are primarily related to the following kinds of effects.

- Increases in water turbidity and deposition of fine sediments on stream and lake bottoms result from agricultural practices on fee lands (CSKT, Water Management Program, field reports 1990-1993). Turbidity and fine sediments can negatively affect aquatic life in tribal waters by reducing photosynthesis of plant life, by interfering with sight feeding of fish, by smothering fish eggs and insect life, and by reducing the habitat available for food organisms and spawning of fish.

  The result of increased turbidity and sediment deposition can be a lower growth rate of fish from loss of food resources and/or elimination or significant reduction of spawning success in streams. Fish populations in both the streams and the lakes to which they are tributary may decline. This could be particularly important to the west-slope cutthroat trout (rare in Flathead Lake) which is dependent upon the habitat and water quality of tributary streams for spawning.

- As herbicides and pesticides are used on Reservation fee lands, increases in loadings of these substances can result from agricultural runoff from these lands (runoff may be a result of irrigation use of waters, precipitation or both). Depending on the concentrations, these loadings may cause direct mortality or reduction of growth and reproduction in fish and invertebrates. Tribal members may also face increased health risks

from exposure to herbicides and pesticides present in fish flesh or drinking water taken from tribal waterbodies or from ingestion of wildlife that feed upon aquatic plants or animals in tribal waterbodies. Although concentrations of herbicides and pesticides have not been measured from agricultural runoff within the reservation, elevated levels are well documented from agricultural areas around the nation.

- Diversion of flows for agricultural uses on fee lands and return flow from fee lands can result in secondary effects on water quality and the integrity of aquatic communities by increasing stream temperatures and by the loss of physical habitat for fish and other life. Increased stream temperatures may exceed levels necessary for optimum growth, cause direct mortality, or prevent successful spawning and survival of coldwater fish such as salmon and trout;

- Agricultural runoff from fee lands has been identified as a significant source of water quality degradation. Increases in loading of nutrients (primarily nitrogen and phosphorus compounds) can result from both irrigation and precipitation. These nutrients can stimulate undesirable increased growth of vegetation in lakes or streams. High concentrations of phytoplankton (microscopic plants) or larger plants are known to result in undesirable changes in water quality on a daily or seasonal basis. For example, excessive vegetation may result in very low levels of dissolved oxygen during dark hours when

photosynthesis does not occur but respiration continues. Stimulation of plant growth from excessive nutrients may result in low dissolved oxygen and fish kills during winter periods.

High nutrient levels also encourage a shift in the species of lake phytoplankton, encouraging the bluegreen algae typical of eutrophic (over-enriched) lakes. This may result in a less desirable food source for zooplankton, production of plant toxins, and seasonal low dissolved oxygen concentrations.

- Increases in loadings of ammonia, chlorine and oxygen-demanding substances (BOD) may result from improper operation or accident conditions at sewage treatment plants on fee lands which discharge into tribal waters. Because rather small shifts in pH and temperature can significantly increase the toxicity of ammonia, effects of discharges on the growth and survival of aquatic life may occur far downstream from discharges. Ammonia and its breakdown products may also serve as nutrients for excessive plant growth and as sources of oxygen demand, which can lower oxygen levels in tribal waters.

  Chlorine has direct toxicity to aquatic life at very low levels and may directly affect the growth, reproduction and survival of aquatic life.

  Increases in BOD loading can result in reduced oxygen levels, which affects aquatic life survival, growth, and productivity.

- Fecal contamination of tribal waters can result from improper operation or accident conditions at sewage treatment plants on fee lands that discharge into tribal waters. Fecal coliforms are indicators of health risks resulting from human waste, and diseases may pass to human populations that drink, bathe, or otherwise come in contact with tribal waters so contaminated.

4. Examples of actions originating on fee lands that have potential impacts on the water quality and beneficial uses of tribal waters that are serious and substantial.

EPA believes that actions on fee lands have potential impacts that are serious and substantial on the beneficial uses of fisheries and aquatic life, recreation, and drinking water supplies and on the physical, chemical and biological integrity of tribal waters. A similar conclusion was reached in the 1992 Assessment of Water Quality on the Flathead Reservation. The Report concluded that, "As streams flow onto valley floors, human impacts causing diminished water quality and aesthetic appeal are evident in almost every stream."

The following examples provide recent or ongoing illustrations of actions on fee lands that can affect the water quality and beneficial uses of tribal waters and have potential for direct impacts on the health and welfare of the Tribe that are serious and substantial. Examples include effects on streams, lakes and wetlands. These examples are illustrative and not comprehensive.

a) Flathead Lake

Flathead Lake is the major water body on the Flathead Reservation and encompasses approximately 126,000 acres within Reservation boundaries. South Bay, at the south end of the lake, is entirely within tribal boundaries, is semi-isolated and relatively shallow (and is therefore more susceptible to pollution). The City of Polson lies along the southern border of the bay.

Examples of actions originating on fee lands that have potential impacts that are serious and substantial on the water quality and beneficial uses of Flathead Lake include:

- Discharges from the Flathead Lake RV and Campground (east shore of Flathead Lake). This campground has been found to discharge without a permit, and the discharge has contained fecal coliform concentrations that exceed EPA criteria for the protection of human health. The facility was the subject of an EPA Administrative Order, Docket #8-93-01-PI, 10 May 1993, and operated during the summer of 1993 and 1994 without a discharge permit. As a result of this discharge originating on fee lands, the Tribes notified EPA of their concern about the safety of tribal members and other citizens that may swim or bathe in the vicinity of the lake discharge (letter to Paul Montgomery, US EPA, Helena, Mt., 27 July, 1993). This discharge resulted in a temporary loss of a recreational beneficial use in the area of the lake where the discharge occurs (memo to tribal Division of Lands and letter to Lake County from CSKT, Dept. of Natural Resources.

- On 5/26/90, gas and oil was discharged from a boat into Indian Bay, a shallow bay containing nesting waterfowl (CSKT, Shoreline Protection Office field report). Wildlife beneficial uses were potentially impaired by direct action of petroleum products on young and adult birds in the area.

- The Montana 305(b) Report (a biennial report assessing the status of state waters) notes that "Flathead Lake data have shown a decline in lake quality due to increased algal production since 1977". Nutrient loading of Flathead Lake is a significant concern in maintaining the ecology of the lake, and this decline in water quality has been and continues to be a significant concern to the Tribe, and has resulted in an EPA grant to study the nutrient loading and dynamics of the lake. Although presently the total loading of lake nutrients comes primarily from the upper basin through the upper Flathead River, the potential for fee lands to significantly influence nutrient loading in lower portions of the lake and South Bay exists because of the large proportion of these lands that surround the lake.

- At present, at least five storm drains flow into South Bay from the city of Polson. The City also has "overflow" from a pumping/lift station which has historically flowed into the river at Riverside Park. These drains are potential sources of nutrient loading as well as other contaminants such as metals, turbidity, oil and grease and fecal bacteria (Results of the Nationwide National Urban Runoff Program studies, USEPA, December,

1993). In addition, there are cattle lots within the city that contribute to the storm drain effluent. Eutrophication of the lower bay could affect valuable perch and lake trout fisheries and affect recreation and aesthetic values of tribal members through influence on the fisheries and presence of algal blooms (personal communication, CSKT, Dept of National Resources).

- Sedimentation and increased turbidity of tributary waters entering Flathead Lake have been documented by CSKT to originate on fee lands and have the potential to affect localized nearshore lake areas by reducing light penetration for photosynthesis and by smothering or providing unsuitable substrate from some invertebrate populations (personal communication, observations by CSKT, Dept of Natural Resources staff). These conditions, plus increased temperatures and loss of spawning habitat in tributary streams, have the potential to impair fish populations of the lake, particularly the rare native westslope cutthroat trout.

- Sites at the "Town Pump" and "Four Corners" service stations in the city of Polson are known sources of petroleum contamination that enter tribal waters at South Bay and near the outlet to the Flathead River below Flathead Lake. Contamination from the gas stations has added to contamination from previously contaminated fill materials at the sites, and concentrations of benzene, ethyl benzene, toluene and xylene have been documented (Shannon Environmental, Reports to City of Polson). Leakage from these sites is

believed to result in a discharge to the lake during periods of low lake level (personal communication, Salish-Kootenai Tribe, tribal Shoreline Protection Office.

b) Flathead River below Flathead Lake.

The Flathead River, from below the lake downstream to the tribal boundary, is surrounded by primarily tribal lands. However, most of the lands that drain directly to the river or through its major tributaries are fee lands. Major tributaries are the Jocko River from the south-east, Mission Creek from the east, Crow Creek from the central east, and the Little Bitterroot from the central west. Degraded water quality exists in some of these streams (CSKT, Water Quality Assessment Report, 1992), and impaired water quality effects on these tributaries have the potential to impair the Flathead River.

An example of effects on water quality in the river comes from the sewage treatment plant discharge from the City of Polson. On two occasions the effluent has exceeded its BOD permit limits (Discharge Monitoring Reports to the State of Montana, 9/30/92 and 6/30/93). BOD is a measure of the oxygen consuming capacity of the discharge and directly influences water quality by using up available oxygen within the river. Although biological effects on the river have not been directly investigated, lowered oxygen values can adversely affect fish and other aquatic life of the river and result in the significant potential for impairment of the aquatic life beneficial use.

In addition, there are three storm drains that discharge into the river from the city. Although specific effects of these drains have not been investigated, nationwide there is concern about the effects of storm runoff on the biological integrity of streams and lakes (Environmental Impacts of Stormwater Discharges, USEPA, June, 1992).

Other discharges known to have occurred that would affect the water quality of the Flathead River are (personal communication, CSKT Dept of Natural Resources):

- On 1/4/88, 3500 gallons of diesel fuel spilled in to the river; and
- On 1/20/89, a gas tank overflowed spilling approximately 20 gallons of gas into the river.

No studies were performed to document effects of these discharges, however, petrochemicals are known to cause chronic and acute effects on both aquatic life and wildlife. A significant potential for impairment of the aquatic life and wildlife uses exists.

c) Little Bitterroot River

The Little Bitterroot River system drains a substantial amount of irrigated land in the north-west quarter of the Reservation. Irrigation practices on fee lands result in periodic high concentrations of suspended solids and high salt concentrations (1992, CSKT, Water Quality Assessment Report). Impacts that result from these activities include stream gravels that are heavily imbedded in fine sediments and degraded riparian areas. These

impacts affect aquatic life by reducing or eliminating spawning and other life stage habitats and by increasing summer/fall temperatures in the stream to levels unsuitable for cold water species. An overall lowered productivity of the stream and impaired aquatic life beneficial use is likely to result.

d) Lower Crow Reservoir and Crow Creek

- Lower Crow Reservoir lies in the central portion of the Reservation, just to the east of the Flathead River. The upper drainage is entirely tribal wilderness. Much of the lands surrounding the reservoir are primarily fee lands, and approximately half the lands along the creek below the reservoir are fee lands.
- Nutrient loading and sediment loading of the reservoir is the most significant known impact on water quality (303 Water Monitoring Program, CSKT Natural Resources Dept). The reservoir periodically exhibits high turbidity which is likely to impair its value as aquatic habitat from some fish and invertebrate species.
- At times, poor quality waters from the reservoir drain to Crow Creek, which results in high suspended solids and salts and degraded fish habitat due to sediment deposition (visual observations by CSKT Dept of Natural Resources staff). In addition, the community of Ronan STP (5 miles south of Pablo) which discharges to Crow creek has exceeded the BOD limits in their discharge permit a number of times, which can lead to

lowered dissolved oxygen in the creek (Discharge Monitoring Reports to the State of Montana, 6/30/90, 3/3/91, 11/30/91 and 12/31/92).

- A camper-trailer discharge of "grey" water (kitchen/bath water) and "black" water (untreated sewage) to the creek has been reported (citizen report to CSKT, Dept of Natural Resources, July 6, 1994). In addition, reports have also been made of a slaughterhouse near Ronan discharging meat refuse into the creek (citizen reports in December, 1985, and June, 1994). Both of these instances originate on fee lands and have the significant potential to impair human health, aquatic life uses and aesthetic qualities, and contribute to a significant decline in dissolved oxygen in the creek.
- The CSKT Dept of Natural Resources believes that the combined effects of all of these activities have significantly contributed to the low fisheries productivity observed in the creek and resulted in the significant potential for impairment of aquatic life and recreation beneficial uses (personal communication with CSKT, Dept of Natural Resources staff, based on site investigation).

e) Tribal wetlands

The following examples illustrate how waters of two tribal wetlands have been negatively affected by actions on fee lands:

- Operations of non-tribal restaurant in the community of Charlo (north of the National

Bison Range) resulted in sewage surfacing and draining into a tribal wetland during the week of July 1, 1994 (site investigation, CSKT, Dept of Natural Resources). Because of the presence of untreated sewage and bacterial contamination of the wetland, human health, aquatic life and recreational beneficial uses of the wetland had the significant potential of being impaired.

- In the second case, sewage from a rented trailer on fee lands in the Community of Charlo was discharged into tribal wetlands during the week of July 1, 1994. CSKT staff (personal communication) believes this has been going on for some time. Again, because of the presence of untreated sewage and bacterial contamination human health and recreational and aquatic life beneficial uses of the wetland had the significant potential of being impaired.

f) Spring Creek

Spring Creek is a tributary of Post Creek near the community of Charlo. A community home without a septic system discharged into an irrigation ditch which flows into Spring Creek, and fecal coliform counts as high as 1,000 times EPA criteria have been monitored (personal communication, CSKT Dept of Natural Resources, site investigation). In addition to fecal coliforms, the discharge would result in increases in oxygen-demanding materials in the effluent, although this was not quantified. As a result of this discharge from fee lands, human

health, recreation, and aquatic life uses in the stream uses had the significant potential of being impaired.

g) Mission Creek

Mission Creek flows primarily through fee lands from Mission Reservoir to the Flathead River. The stream exhibits high suspended solids loading, high nutrient levels and degraded fish habitat, partially as the result of deposition of fine sediments in the stream bottom (CSKT Water Quality Assessment Report, 1992). CSKT, Dept of Natural Resources believes that fee lands are a significant contributor to these water quality and habitat impacts, which have resulted in a loss of aquatic productivity and resulted in the significant potential for impairment of the beneficial uses of aquatic life and recreation (personal communication).

h) Sabine Creek

Sabine Creek is a tributary of Mission Creek flowing near the community of St. Ignatius. The St. Ignatius sewage treatment plant has been discharging effluent to the creek and the effluent has contained a biological oxygen demand (BOD) in excess of permit limits (Discharge Monitoring Reports to the State of Montana, 4/30/90, 5/31/90, 4/30/91/, 5/31/91). The potential result of this excess BOD is a lowered dissolved oxygen in Sabine and Mission creeks which can reduce aquatic productivity and/or result in the death of aquatic life. As a result, aquatic life and recreational beneficial uses had the significant potential of being impaired.

i) Hot Spring Creek

Hot Spring Creek is a tributary of the Little Bitterr oot [sic] River, originating in the far central-western portion of the Reservation. The community of Hot Springs discharges effluent to Hot Spring Creek from their sewage treatment plant and have exceeded the BOD limits of their permit in recent years (Discharge Monitoring Reports to the State of Montana, 8/31/90, 3/31/92, 4/30/94, 5/31/94). The BOD contributes to a lowering of the dissolved oxygen in the stream and can reduce the aquatic productivity and/or result in the death of aquatic life. As a result of these excessive discharges from fee lands, the aquatic life and recreational beneficial uses of tribal waters had a significant potential for being impaired.

5. Beneficial uses that may not be protected.

The CWA allows States and Tribes to set water quality standards to protect any beneficial uses they deem appropriate. Water quality standards that protect religious and cultural beneficial uses may also be adopted by the Tribes and are presently not recognized as existing or designated uses by the State of Montana standards. These unique, beneficial uses of tribal waters may not be protected without tribal authority to set water quality standards. Because of the lack of State standards to protect such uses, activities originating from fee lands have potential impacts that are serious and substantial on the welfare of the Tribes and tribal members who use tribal waters for religious and cultural purposes.

6. Degradation of tribal waters.

EPA water quality standards regulations at 40 CFR 131 require Tribes and States to have antidegradation policies and implementing procedures to protect waters that have a quality better than necessary to support aquatic life, wildlife and recreation uses. State and tribal antidegradation programs must also include provisions for the designation and protection of Outstanding National Resource Waters (ONRW's) and must prohibit the loss or impairment of any existing uses. Because EPA policy allows for a range of discretion in the formulation and implementation of these policies, the Tribes may wish to have more stringent protection of its high quality waters than current Montana State policy requires.

Degradation of tribal waters has the potential for affecting the welfare of the Tribes through influence on economic growth and tourism. In its brochure, "Flathead Reservation" (undated), the Tribes describe their natural resources, saying that,

> "A variety and abundance of natural resources make the Flathead Reservation one of the most attractive places in the United States. Its land, water, forest, recreational and scenic resources draw people here to live, work and play." Further, "The Confederated Salish and Kootenai Tribes are very much aware of the importance of protecting these resources."

The ability to establish and implement guidelines to designate and protect ONRWs is an essential governmental option provided by the CWA. In carrying out a tribal program to designate and protect ONRWs, tribal

control over the stream designations and degrading activities on fee lands can be crucial to avoiding effects that are serious and substantial on the water quality of ONRW waterbodies and thus on the welfare of the Tribes and tribal members.

B. Finding

EPA finds that existing and future activities on fee lands within the exterior borders of the Flathead Reservation have potential direct impacts on the health and welfare of the Tribes and tribal members that are serious and substantial. The establishment of water quality standards by the Tribes will enable the Tribes to set appropriate water quality goals to aid in avoiding these potential impacts.

56 Fed. Reg. 64876 (December 12, 1991)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[WH-FRL-4038-8]

Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This rule amends the water quality standards regulation by adding: (1) The procedures by which an Indian Tribe may qualify for treatment as a State for purposes of the Clean Water Act section 303 water quality standards and section 401 certification programs, and (2) a mechanism to resolve unreasonable consequences that may arise from Indian Tribes and States adopting differing water quality standards on common bodies of water.

EFFECTIVE DATE: The rule shall be effective January 13, 1992.

ADDRESSES: The public may inspect the administrative record for this rulemaking and all comments received on the proposed regulation at the Environmental Protection Agency, Standards and Applied Science Division, Office of Science and Technology, room 919 East Tower, 401 M

Street, SW., Washington, DC, between the hours of 8 a.m. and 4:30 p.m. on business days. A reasonable fee will be charged for copying. Inquiries can be made by calling 202-260-1315.

FOR FURTHER INFORMATION CONTACT: David K. Sabock, Environmental Protection Agency, Standards and Applied Science Division, (WH-585), 401 M Street, SW., Washington, DC, 20460, (202) 260-1318.

SUPPLEMENTARY INFORMATION: Information in this preamble is organized as follows:

A. Background
B. Changes to the Proposed Rule
C. Response to Public Comments
1. Treatment of Tribes as States
2. Dispute Resolution Mechanism
3. Establishing Water Quality Standards on Reservations
4. Other Comments
D. Regulatory Flexibility Act
E. Paperwork Reduction Act
F. Regulatory Impact Analysis

A. Background

Section 303(c) of the Clean Water Act (33 U.S.C. 1313(c)) requires the States to develop, review, and revise water quality standards for all surface waters of the United States. The Environmental Protection Agency's (EPA's) implementing regulations (40 CFR part 131) require that, at a minimum, such standards include designated water uses, in-stream criteria to protect such uses, and an antidegradation policy. EPA's role in the water

quality standards program is to review and approve or disapprove the State-adopted water quality standards and, where necessary, to promulgate Federal water quality standards.

Section 401 of the CWA provides that States may grant or deny "certification" for Federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the State's determination regarding whether the proposed activity will comply with the requirements of certain sections of the CWA enumerated in section 401(a)(1). These sections include those requiring water quality standards and effluent limitations. If a State denies certification, the Federal permitting or licensing agency is prohibited from issuing a permit or license. Certifications are subject to objection from downstream States where the downstream State determines that the proposed activity would violate its water quality requirements. Certifications are normally issued by the State in which the discharge originates, but may be issued in certain circumstances by an interstate agency or the Administrator.

The February 4, 1987 Amendments to the Act added a new section 518, which requires EPA to promulgate regulations specifying how the Agency will treat qualified Indian Tribes as States for the purposes of, among others, the section 303 (water quality standards) and section 401 (certification) programs described above. Section 518 also requires EPA, in promulgating these regulations, to establish a mechanism to resolve unreasonable consequences that may result from an Indian Tribe and a State

adopting differing water quality standards on common bodies of water.

On September 22, 1989, the Environmental Protection Agency (EPA) proposed amendments to the water quality standards regulations in response to CWA section 518 requirements (*see* 54 FR 39098). The proposal included amendments that would: (1) Add procedures by which an Indian Tribe could qualify for treatment as a State for purposes of the section 303 water quality standards and section 401 certification programs of the Clean Water Act, and (2) establish a mechanism to resolve unreasonable consequences that may result from an Indian Tribe and a State adopting differing water quality standards on common bodies of water. Pursuant to CWA section 518, the proposal had been prepared in consultation with States and Indian Tribes. The proposal was developed with the assistance of an informal work group composed of representatives from Indian Tribes, States, and EPA. In addition, a national consultation meeting involving States and Tribes was held in Denver, Colorado in June of 1988 for the purpose of obtaining additional comments. Finally, EPA distributed a number of drafts of the proposal to all States and Tribes (following a mailing list of Federally recognized Tribes obtained by the Office of Water) for review and comment prior to issuing the proposed rule.

Public hearings on the September 22, 1989 proposal were held in Phoenix, Arizona on November 14, 1989, Rapid City, South Dakota on November 16, 1989, and Washington, DC on December 5, 1989. A total of 25 people registered at the three hearings. The public comment period closed on December 22, 1989. EPA received a total of 34 written comments on the proposed rule.

EPA notes that more comments were received on the various drafts of the proposed rule than on the proposed rule which was ultimately published. EPA believes that many of the difficult issues were resolved during the consultation period prior to proposal, and that this explains why relatively few comments were received on the proposal and why relatively few changes to the proposal were required in preparing today's final rule. Another reason is that EPA had previously published similar procedures under CWA section 518 for the section 106 water quality management and planning program (54 FR 14354; April 11, 1989).

Additional background information was included in the preamble to the proposed rulemaking.

* * *

C. Response to Public Comments

The response to public comments is organized into four sections: (1) Treatment of Tribes as States, (2) dispute resolution mechanism, (3) establishing water quality standards on Indian reservations, and (4) other comments. Comments discussed within each of these sections have been further categorized by topic.

1. Treatment of Tribes as States

Comments on the Authority Requirements

a. The Scope of Inherent Tribal Authority

Comment: The issue of whether and how EPA should require Tribes to demonstrate that they meet the requirements of section 518(e)(2) of the CWA, i.e., that they can

demonstrate authority to regulate water quality within the boundaries of their reservations, attracted significant comment. Numerous commenters remarked on the significance of the Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989) for EPA's programs and today's regulations, although there were widely differing views of how to read the decision. Several commenters asserted that *Brendale* clearly indicates that an Indian Tribe may not enforce its water quality standards against non-members of the Tribe on non-Indian-owned fee lands within the boundaries of the reservation or that, at the very least, the Tribe must include detailed factual information that describes the non-Indian lands the Tribe proposes to regulate and the reasons supporting its jurisdictional assertions.

By contrast, other commenters asserted that Tribes invariably possess inherent authority to regulate all reservation waters, and that EPA should presume the existence of such authority and not require Tribes to make any specific factual showing. These commenters asserted that such authority over environmental matters was recognized in *Montana v. United States*, 450 U.S. 544 (1981), and not diminished by *Brendale*.

Response: EPA does not read the holding in *Brendale* as preventing EPA from recognizing Tribes as States for purposes of regulating water quality on fee lands within the reservation, even if section 518 is not an express delegation of authority (an issue discussed in detail below). In *Brendale*, both the State of Washington and the Yakima Nation asserted authority to zone non-Indian real estate developments on two parcels within the Yakima reservation, one in an area that was primarily Tribal, the

other in an area where much of the land was owned in fee by nonmembers. Although the Court analyzed the issues and the appropriate interpretation of *Montana* at considerable length, the nine members split 4:2:3 in reaching the decision that the Tribe should have exclusive zoning authority over property in the Tribal area and the State should have exclusive zoning authority over non-Indian owned property in the fee area. The decision reflects some difficult issues in this area of the law and, as the comments indicated, has generated considerable controversy over the extent of Tribal authority.

Given the lack of a majority rationale, the primary significance of *Brendale* is in its result, which was fully consistent with *Montana v. United States,* which previously had held that:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate * * * the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements * * * . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66 (citations omitted).

In *Brendale*, the Court applied this test, finding Tribal authority over activities that would threaten the health and welfare of the Tribe, 492 U.S. at 443-444 (Stevens, J.,

writing for the Court); *id.* at 449-450 (Blackmun, J. concurring). Conversely, the Court found no Tribal jurisdiction where the proposed activities "would not threaten the Tribe's * * * health or welfare." *Id.* at 432 (White, J., writing for the Court). The Agency therefore disagrees with commenters who argue that *Brendale* somehow overrules *Montana.*

As further discussed below, EPA agrees with certain commenters that pending further judicial or Congressional guidance on the extent to which section 518 delegates additional authority to Tribes, the ultimate decision regarding Tribal authority must be made on a Tribe-by-Tribe basis and has finalized the proposed process for making those determinations. Thus, EPA rejects the suggestion of other commenters that EPA make a conclusive statement regarding the extent of Tribal jurisdiction over fee lands for all Tribes and all waters or even a statement regarding any particular reservation, except in the context of an actual treatment as a State application. This is consistent with the approach the Agency adopted under the Safe Drinking Water Act, when it determined that it would not "automatically assume," or adopt, in the first instance, a rebuttable presumption of tribal authority over all water within a reservation that would operate even in the absence of any factual evidence. *See* 53 FR 37396, 37399 (September 26, 1988). Nonetheless, EPA sees no reason in light of *Brendale* to assume that Tribes would be per se unable to demonstrate authority over water quality management on fee lands within reservation borders. Rather, as discussed below, EPA believes that as a general matter there are substantial legal and factual reasons to assume that Tribes ordinarily have the legal

authority to regulate surface water quality within a reservation.

In evaluating whether a tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation, EPA will examine the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale*. The extent of such tribal authority depends on the effect of that activity on the tribe. As discussed above, in the absence of a contrary statutory policy, a tribe may regulate the activities of non-Indians on fee lands within its reservation when those activities threaten or have a direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 565-66. However, in *Brendale* several justices argued that for a tribe to have "a protectable interest" in an activity, the activity's effect should be "demonstrably serious." *Brendale*, 1492 U.S. at 431 (White, J.). In addition, in a more recent case involving tribal criminal jurisdiction, a majority of the Court indicated in dicta that a tribe may exercise civil authority "where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination." *Duro v. Reina*, 110 S.Ct. 2053, 2061 (1990). *See also Brendale*, 492 U.S. at 450 (Blackmun, J.) (test for inherent tribal authority whether activities "implicate a significant tribal interest"); *id.* at 462 (Blackmun, J.) (test for inherent tribal authority whether exercise of authority "fundamental to the political and economic security of the tribe").

As discussed above, the Supreme Court, in recent cases, has explored several options to assure that the impacts upon tribes of the activities of non-Indians on fee land, under the *Montana* test, are more than de minimis,

although to date the Court has not agreed, in a case on point, on any one reformulation of the test. In response to this uncertainty, the Agency will apply, as an interim operating rule, a formulation of the standard that will require a showing that the potential impacts of regulated activities on the tribe are serious and substantial.

The choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard per se. Moreover, as discussed below, the Agency believes that the activities regulated under the various environmental statutes generally have serious and subtantial impacts on human health and welfare. As a result, the Agency believes that tribes will usually be able to meet the Agency's operating rule, and that use of such a rule by the Agency should not create an improper burden of proof on tribes or create the administratively undesirable result of checkerboarding reservations.

Whether a tribe has jurisdiction over activities by nonmembers will be determined case-by-case, based on factual findings. The determination as to whether the required effect is present in a particular case depends on the circumstances.

Nonetheless, the Agency may also take into account the provisions of environmental statutes, and any legislative findings that the effects of the activity are serious in making a generalized finding that Tribes are likely to possess sufficient inherent authority to control reservation environmental quality. *See, e.g., Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 476-77 and notes

6, 7 (1987). As a result, in making the required factual findings as to the impact of a water-related activity on a particular tribe, it may not be necessary to develop an extensive and detailed record in each case. The Agency may also rely on its special expertise and practical experience regarding the importance of water management, recognizing that clean water, including critical habitat (i.e., wetlands, bottom sediments, spawning beds, etc.), is absolutely crucial to the survival of many Indian reservations.

The Agency believes that Congressional enactment of the Clean Water Act establishes a strong federal interest in effective management of water quality. Indeed, the primary objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (section 101(a)) and, to achieve that objective, the Act establishes the goal of eliminating all discharges of pollutants into the navigable waters of the U.S. and attaining a level of water quality which is fishable and swimmable (section 101(a)(1)-(2)). Thus the statute itself constitutes, in effect, a legislative determination that activities which affect surface water and critical habitat quality may have serious and substantial impacts.

EPA also notes that, because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are very likely to impair the water and critical habitat quality

of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality. EPA believes that a "checkerboard" system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments.

EPA also believes that Congress has expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA. This is confirmed by the text and legislative history of section 518 itself. The CWA establishes a policy of "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" section 101(b). By extension, the treatment of Indian Tribes as States means that Tribes are to be primarily responsible for the protection of reservation water resources. As Senator Burdick, floor manager of the 1987 CWA Amendments, explained, the purpose of section 518 was to "provide clean water for the people of this Nation." 133 Cong. Rec. § 1018 (daily ed. Jan 21, 1987). This goal was to be accomplished, he asserted, by giving "tribes * * * the primary authority to set water quality standards to assure fishable and swimmable water and to satisfy all beneficial uses." *Id.*

In light of the Agency's statutory responsibility for implementing the environmental statutes, its interpretations of the intent of Congress in allowing for tribal management of water quality within the reservation are entitled to substantial deference. *Washington Dept. of Ecology v. EPA*, 752 F. 2d 1465, 1469 (9th Cir. 1985); *see generally Chevron, USA v. NRDC*, 467 U.S. 837, 843-45 (1984).

The Agency also believes that the effects on tribal health and welfare necessary to support Tribal regulation of non-Indian activities on the reservation may be easier to establish in the context of water quality management than with regard to zoning, which was at issue in *Brendale*. There is a significant distinction between land use planning and water quality management. The Supreme Court has explicitly recognized such a distinction: "Land use planning in essence chooses particular uses for the land; environmental regulation * * * does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 587 (1987). The Court has relied on this distinction to support a finding that states retain authority to carry out environmental regulation even in cases where their ability to carry out general land use regulation is preempted by federal law. *Id.* at 587-89.

Further, water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government. The special status of governmental

actions to protect public health and safety is well established.[1] By contrast, the power to zone can be exercised to achieve purposes which have little or no direct nexus to public health and safety. *See e.g. Brendale*, 492 U.S. at 420 n.5 (White, J.) (listing broad range of consequences of state zoning decision). Moreover, water pollution is by nature highly mobile, freely migrating from one local jurisdiction to another, sometimes over large distances. By contrast, zoning regulates the uses of particular properties with impacts that are much more likely to be contained within a given local jurisdiction.

Operationally, EPA's generalized findings regarding the relationship of water quality to tribal health and welfare will affect the legal analysis of a tribal submission by, in effect, supplementing the factual showing a tribe makes in applying for treatment as a State. Thus, a tribal submission meeting the requirements of s 131.8 of this regulation will need to make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe. Once the Tribe meets

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[1] This special status has been reaffirmed by all nine justices in the context of Fifth Amendment takings law. *See Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 491 n. 20 (1987); *Id.* at 512, (Rehnquist, C.J., dissenting).

this initial burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, presume that there has been an adequate showing of tribal jurisdiction of fee lands, unless an appropriate governmental entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.

The Agency recognizes that jurisdictional disputes between tribes and states can be complex and difficult and that it will, in some circumstances, be forced to address such disputes. However, EPA's ultimate responsibility is protection of the environment. In view of the mobility of environmental problems, and the interdependence of various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection, rather than engage in confrontations over jurisdiction.

b. The Effect of Section 518 on Tribal Authority over Non-Indian Activities

Comment: EPA has received letters from three members of Congress, Senator Simpson, Senator Baucus, and Representative Morrison, regarding the impact of *Brendale* on EPA's Indian Policy and the development of "treatment as a State" regulations for EPA water programs in light of the legislative history of section 518. All three commenters asserted that Congress did not intend to expand the scope of Tribal authority over non-Indians on the reservation by the passage of section 518.

Rep. Morrison asserted that he inserted into the Congressional Record a memorandum written by staff on the House Committee on Interior and Insular Affairs regarding section 518 (also inserted into the Congressional Record by Senator Adams at 133 Cong. Rec. § 753-54 (daily ed. January 14, 1987)) solely to demonstrate that section 518 was not intended to expand Tribal water quantity rights. 133 Cong. Rec. H184-85 (daily ed. Jan 8, 1987). Rep. Morrison disavowed other statements from that memorandum which might support the proposition that Congress intended to authorize Tribal jurisdiction over non-members on reservations. ("Indian tribes have the right to regulate lands and other natural resources within the reservation, including non-Indian owned fee lands or resources." *Id.* (emphasis added)). Rep. Morrison stated his belief that Congress did not, by the passage of section 518, expand the scope of Tribal authority over non-Indians. In light of this legislative history, Rep. Morrison asserted that, consistent with *Brendale*, EPA should not allow Tribal regulation of non-members on so-called "open" reservations.

Senators Baucus and Simpson also recommended that EPA consider the legislative history of section 518(e) and the *Brendale* decision and determine not to allow Tribal regulation over non-members on the reservation.

Finally, all three of these Congressional commenters asserted that the legislative history of section 518 clearly shows that it was not intended to affect rights to water quantity under State law. The concerns raised by these Members of Congress echo other comments discussed elsewhere in today's notice. Several commenters asserted that section 518(e)(2) should not be read as an express

grant of Congressional authority to Indian Tribes to regulate such fee lands, despite indications in *Brendale* to the contrary.

By contrast, Senators McCain, Burdick, and Inouye expressed a view that section 518(e) delegates Tribes authority to regulate all waters within reservation boundaries including those on non-Indian fee lands. Some commenters cited *Brendale* for this proposition. The latter argument of these commenters is based upon the opinion of Justice White in *Brendale*. Justice White indicates that certain statutes may delegate Federal authority to Tribes, thereby providing a basis for authority over all lands within a reservation. As Justice White explained, on the record in *Brendale* there could be

> no contention * * * that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe. Compare 18 U.S.C. 1151, 1161 (1982 ed., and Supp. V); 33 U.S.C. 1377 (e) and (h)(1) (1982 ed., Supp. V) [i.e., sections 518(e) and 518(h)(1) of the CWA].

492 U.S. at 428 (1989) (White, J.) (emphasis added). This language clearly categorizes the two cited statutory schemes as express delegations of Federal authority. Thus, Justice White, inter alia, cites the Clean Water Act as an example of an explicit delegation of authority over non-Indian activities to Indian Tribes. *Response:* EPA has fully considered the Congressional comments and their interpretation of the legislative history of section 518. EPA must, of course, consider contemporaneous legislative history as it is written, and has been cautioned not to rely on subsequent statements by Members of Congress.

Hazardous Waste Treatment Council v. EPA, 886 F.2d 355 (DC Cir. 1989), *cert. denied*, 111 S.Ct. 139 (1990).

EPA differs with the Congressional commenters to the extent that they suggest the legislative history of section 518 is clear and expresses an intent to limit the scope of Tribal authority. EPA notes that other legislative history might be interpreted as evincing Congressional intent to confer expanded Tribal authority over non-Indians within the reservation.

In particular, the following colloquy between Senators Inouye and Burdick on this issue is very relevant:

> Mr. Inouye: * * * I am concerned about section 518(e)(2). As I read that provision, it enables qualified Indian tribes to exercise the same water quality regulatory jurisdiction with respect to water that traverses, borders, or is otherwise located within their reservations [paraphrasing section 518(h)(1) and 18 U.S.C. 1151(a)] that States have for regulation of water outside Indian reservations. Is my understanding of Section 518(e) correct?
>
> Mr. Burdick: Yes. The intent of the conferees was to assure that Indian tribes would be able to exercise the same regulatory jurisdiction over water quality matters with regard to waters within Indian jurisdiction that States have been exercising over their water.

133 Cong. Rec. § 1018 (daily ed. Jan. 21, 1987) (emphasis added). Senator Inouye's statement could arguably support a reading that Congress intended to recognize Tribal authority over all waters within the reservation, including those managed by non-Indians. Mr.

Burdick, a member of the Conference Committee, agrees with Senator Inouye's statement.

However, in EPA's view this colloquy is ambiguous and inconclusive. Senator Burdick, in responding to Senator Inouye, agrees that under section 518 Tribes may regulate waters only if they are already "within Indian jurisdiction." However, Senator Burdick was only recognizing the status quo, i.e., whatever is within Indian jurisdiction may be regulated via section 518. Senator Burdick's statement does not clearly show that he – or the Congress as a whole – intended to legislate that all waters within the reservation are in fact "within Indian jurisdiction." Thus, the colloquy is circular: Indians have jurisdiction if, but only if, they have jurisdiction from some source other than section 518. It does not clearly indicate whether Congress intended to expand what lies "within Indian jurisdiction."

Further, if this colloquy were to be construed as supporting an expansion of tribal authority, it would arguably conflict with a statement Senator Burdick had made earlier in response to an inquiry from Senator Baucus. In that discussion, Senator Burdick reiterated that section 518 was not intended to affect existing water quantity rights, and added that "[p]rivate lands and water rights owners within boundaries of Indian reservations are not to be additionally affected by this act." 133 Cong. Rec. § 753 (daily ed. January 14, 1987) (emphasis added). This could suggest that the Act was not intended to alter the status quo regarding regulatory authority over fee lands.

The legislative history in the House is also unclear as to whether Congress intended to expand tribal power over non-Indians. The statement in the House staff memorandum cited above supports a view that under current case law Tribes already possess regulatory authority over non-Indians within reservation boundaries; thus it would be unnecessary to delegate such authority to tribes. Insertion of this memorandum into the Congressional Record could suggest that the House agreed with that view; however, this aspect of the memorandum was never the subject of House discussions, which focused almost exclusively on issues relating to water rights.

EPA believes that if Congress had intended to make a change as important as an expansion of Indian authority to regulate nonmembers, it probably would have done so through statutory language and discussed the change in the committee reports. Given that the legislative history ultimately is ambiguous and inconclusive, EPA believes that it should not find that the statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe absent an express indication of Congressional intent to do so. *See Montana*, 450 U.S. at 564. Therefore, EPA has decided that it will, as discussed above, continue to recognize inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law, in light of *Montana, Brendale*, and other applicable case law.

EPA believes that Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law. EPA believes that this approach will best effectuate the overall purposes of the statute.

EPA agrees with those commenters who stated that Justice White's opinion in *Brendale* can be read to suggest a contrary conclusion, and to indicate that at least four justices of the Supreme Court would apparently interpret section 518(e) as expressly delegating to Tribes the authority to regulate water quality on reservations, including those affected by activities on non-Indian fee lands. Nonetheless, EPA recognizes that Justice White's opinion was not a majority opinion of the Court and was not necessary to the decision even of the plurality that joined it, since the issue was not before the Court in *Brendale*. Nor is there any discussion in the opinion about the somewhat confusing legislative history of section 518. The passing reference in that opinion does not finally resolve the question of whether section 518(e) is a delegation of authority, and, as discussed above, EPA does not believe that it can make an absolute determination that Congress in fact expressed a clear intent on the issue.

EPA agrees with the Congressional commenters that section 518 does not affect existing water quantity rights. This has been the Agency's consistent position, based on the language of sections 101(g) and 518(a).

* * *

[FR Doc. 91-29490 Filed 12-11-91; 8:45 am]

40 CFR § 131.8

CODE OF FEDERAL REGULATIONS
TITLE 40 – PROTECTION OF ENVIRONMENT
CHAPTER I – ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D – WATER PROGRAMS
PART 131 – WATER QUALITY STANDARDS
SUBPART A – GENERAL PROVISIONS

§ 131.8 Requirements for Indian Tribes to administer a water quality standards program.

(a) The Regional Administrator, as determined based on OMB Circular A-105, may accept and approve a tribal application for purposes of administering a water quality standards program if the Tribe meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in § 131.3 (k) and (l),

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers,

(3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

(b) Requests by Indian Tribes for administration of a water quality standards program should be submitted to the lead EPA Regional Administrator. The application shall include the following information:

(1) A statement that the Tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of the Tribal government;

(ii) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

(iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Indian Tribe's authority to regulate water quality. The statement should include:

(i) A map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality;

(ii) A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and

(iii) An identification of the surface waters for which the Tribe proposes to establish water quality standards.

(4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality standards program. The narrative statement should include:

(i) A description of the Indian Tribe's previous management experience which may include, the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards;

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a Tribal application.

(6) Where the Tribe has previously qualified for eligibility or treatment as a State under a Clean Water Act or Safe Drinking Water Act program, the Tribe need only provide the required information which has not been submitted in a previous application.

(c) Procedure for processing an Indian Tribe's application.

(1) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to § 131.8(b) in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

(2) Within 30 days after receipt of the Indian Tribe's application, the Regional Administrator shall provide appropriate notice. Notice shall:

(i) Include information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters; and

(ii) Be provided to all appropriate governmental entities.

(3) The Regional Administrator shall provide 30 days for comments to be submitted on the Tribal application. Comments shall be limited to the Tribe's assertion of authority.

(4) If a Tribe's asserted authority is subject to a competing or conflicting claim, the Regional Administrator, after due consideration, and in consideration of other comments received, shall determine whether the Tribe has adequately demonstrated that it meets the requirements of § 131.8(a)(3).

(5) Where the Regional Administrator determines that a Tribe meets the requirements of this section, he shall promptly provide written notification to the Indian Tribe that the Tribe is authorized to administer the Water Quality Standards program.

[56 FR 64895, Dec. 12, 1991; 59 FR 64344, Dec. 14, 1994]

33 U.S.C. § 1313

UNITED STATES CODE
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26 – WATER POLLUTION PREVENTION AND CONTROL
SUBCHAPTER III – STANDARDS AND ENFORCEMENT

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any state and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the

date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if –

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standard; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but

at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing app'icable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State

reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such state shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved –

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be

consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load,

for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such

identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations

(A) Standard not attained

For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard,

or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained

For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not late than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not late than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter

for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required

to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in section 1311(b)(1) and 1311(b)(2) of this title nor to preclude an State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.

33 U.S.C. § 1370

UNITED STATES CODE
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26 – WATER POLLUTION PREVENTION AND CONTROL
SUBCHAPTER V – GENERAL PROVISIONS

§ 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1377

UNITED STATES CODE
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26 – WATER POLLUTION PREVENTION AND CONTROL
SUBCHAPTER V – GENERAL PROVISIONS

§ 1377. Indian tribes

(a) Policy

Nothing in this section shall be construed to affect the application of section 1251(g) of this title, and all of the provisions of this section shall be carried out in accordance with the provisions of such section 1251(g) of this title. Indian tribes shall be treated as States for purposes of such section 1251(g) of this title.

(b) Assessment of sewage treatment needs; report

The Administrator, in cooperation with the Director of the Indian Health Service, shall assess the need for sewage treatment works to serve Indian tribes, the degree to which such needs will be met through funds allotted to States under section 1285 of this title and priority lists under section 1296 of this title, and any obstacles which prevent such needs from being met. Not later than one year after February 4, 1987, the Administrator shall submit a report to Congress on the assessment under this subsection, along with recommendations specifying (1) how the Administrator intends to provide assistance to

Indian tribes to develop waste treatment management plans and to construct treatment works under this chapter, and (2) methods by which the participation in and administration of programs under this chapter by Indian tribes can be maximized.

(c) Reservation of funds

The Administrator shall reserve each fiscal year beginning after September 30, 1986, before allotments to the States under section 1285(e) of this title, one-half of one percent of the sums appropriated under section 1287 of this title. Sums reserved under this subsection shall be available only for grants for the development of waste treatment management plans and for the construction of sewage treatment works to serve Indian tribes, as defined in subsection (h) of this section and former Indian reservations in Oklahoma (as determined by the Secretary of the Interior) and Alaska Native Villages as defined in Public Law 92-203 [43 U.S.C.A. § 1601 et seq.].

(d) Cooperative agreements

In order to ensure the consistent implementation of the requirements of this chapter, an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this chapter.

(e) Treatment as States

The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title to the degree necessary to carry out the objectives of this section, but only if –

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Such treatment as a State may include the direct provision of funds reserved under subsection (c) of this section to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to make grants under subchapter II of this chapter in an amount not to exceed 100 percent of

the cost of a project. Not later than 18 months after February 4, 1987, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

(f) Grants for nonpoint source programs

The Administrator shall make grants to an Indian tribe under section 1329 of this title as though such tribe was a State. Not more than one-third of one percent of the amount appropriated for any fiscal year under section 1329 of this title may be used to make grants under this subsection. In addition to the requirements of section 1329 of this title, an Indian tribe shall be required to meet the requirements of paragraphs (1), (2), and (3) of subsection (d) of this section in order to receive such a grant.

(g) Alaska Native organizations

No provision of this chapter shall be construed to –

(1) grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska;

(2) create or validate any assertion by such organization or any form of governmental authority over lands or persons in Alaska; or

(3) in any way affect any assertion that Indian country, as defined in section 1151 of Title 18, exists or does not exist in Alaska.

(h) Definitions

For purposes of this section, the term –

(1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; and

(2) "Indian tribe" means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

US ENVIRONMENTAL PROTECTION AGENCY (EPA)
TREATMENT OF TRIBES IN THE SAME MANNER AS STATES/PROGRAM APPROVAL MATRIX

As of March 1998

Total Tribes with TAS/PA - 146 [August 1996 Status: 103]
Total TAS/PA Determinations - 211 [August 1996 Status: 172]
Pending TAS/PA Determinations - 48 [August 1996 Status: 37]

GLOSSARY

TAS - Treatment in the Same Manner as a State
PA - Program Approval, When TAS Does Not apply
106 - Clean Water Act Section 106 Water Quality Management Grants Program
314 - Clean Water Act Section 314 Clean Lakes Grant Program
319 - Clean Water Act Section 319 Nonpoint Source Grant Program
303 - Clean Water Act Section 303 Water Quality Standards Program
402 - Clean Water Act Section 402 National Pollution Discharge Elimination System (NPDES) Program
404 - Clean Water Act Section 404 Wetlands Protection Program
PWS - Safe Drinking Water Act Public Water Supply Supervision (PWSS) Program
UIC - Safe Drinking Water Act Underground Injection Control (UIC) Program
PEST - Pesticide Cooperative Agreements

X = Tribe has been determined eligible for TAS by EPA/or has had program approval (PA) where TAS does not apply under the specified program.

P = Applications that have been submitted to an EPA Region and are pending an EPA determination.

Please call Clara Mickles of the American Indian Environmental Office at (202) 260-7519 to make changes or additions.

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Region 1										
Narragansett - RI	X	X								
Houlton Band Of Maliseets - ME	X		P							
Mashantucket Pequot - CT	X									
Penobscot Indian Nation - ME	X									
Wampanoag Tribe of Gay Head (Aquinnah) - MA	X		P							
Region 2										
St. Regis Mohawk - NY	X									
Region 4										
Eastern Band of Cherokee Indians - NC	X	X	X	X						
Miccosukee Indian Tribe of Florida - FL	X			X						
Poarch Bd of Creek Indians - AL	X	X	X							
Seminole Tribe of Florida - FL	X		X	X						

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Region 5										
Grand Portage Band of Chippewa - MN	X			X						
Bois Forte - MN	X			P						
Forest County Potawatomi Tribe - WI	X									
Fond du Lac Band of Chippewa - MN	X			X						
Keweenaw Bay Indian Community - MN	X			P						
Sault Ste. Marie Tribe - MI	X					P				
Leech Lake Band of Chippewa - MN	X	X		P						X
Lac du Flambeau Band of Chippewa- WI	X	X								
Menominee Tribe - WI	X	X								
Mille Lacs Band of Ojibwe - MN	X	X	P	P				X		
Minnesota Chippewa Tribe - MN	X	X								
Mole Lake Sokaogon Chippewa - WI	X	X		X						
Oneida Nation - WI	X									

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Red Cliff Chippewa - WI	X									
Red Lake Chippewa Tribe - MN	X	X		P						
Stockbridge-Munsee Tribe - WI	X									
White Earth Band of Chippewa - MN	X	X								X
Bad River Band of Lake Superior Chippewa - WI	X									
Lac Courte Orielles Band of Chippewa - WI	X									
St. Croix Band of Chippewa - WI	X									
Grand Traverse Reservation, MN	P									
Lower Sioux Indian Community of Minnesota, MN	P									
Upper Sioux Community of Minnesota, MN	P									
Little Traverse Bay Bands of Odawa Indians, MI	P									
Region 6										

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Acoma Pueblo - NM	X	X								
Kaw Nation - OK	X									
Isleta Pueblo - NM	X			X						
Nambe Pueblo - NM	X			X						
Tesuque Pueblo - NM	X			X						
Picuris Pueblo - NM	X			X						
Pojoaque Pueblo - NM	X			X						
Pawnee Tribe of Oklahoma				P						
Sandia Pueblo - NM	X			X						
San Juan Pueblo - NM	X	—		X						
Santa Clara Pueblo - NM	X			X						
Jicarilla Apache - NM	X	X	X							X
Taos Pueblo - NM	X									
San Il Defonso Pueblo - NM	X									
Region 7										
Kickapoo Tribe - KS	X									
Omaha Tribe - NE	X									P
Santee Sioux Tribe - NE	X									P
Winnebago Tribe - NE	X									P

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Potawatomi - KS			X							
Region 8										
Uintah-Ouray - UT	X									
Blackfeet Tribe - MT	X	X								
Confederated Salish & Kootenai Tribes - MT	X			X		P				
Cheyenne River Sioux - SD	X									X
Crow Tribe - MT	X									
Ft. Belknap - MT	X						X			
Ft. Berthold Three Affiliated Tribes - ND	X		P	P –						X
Ft. Peck Assiniboine & Sioux Tribes - MT	X		X	X				P		
Rocky Boys - MT	X									
N. Cheyenne Tribe - MT	X									
Oglala Sioux Tribe - SD	X		P	P						X
Rosebud Sioux Tribe - SD	X									X
Shoshone & Arapahoe Tribes - WY	X	X								
Southern Ute Tribe - CO	X	X	X	P						

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Standing Rock Sioux Tribe - SD/ND	X						P			X
Turtle Mountain Tribe - ND	X	X								
Ute Mountain Ute Tribe - CO	X	X								
Yankton Sioux Tribe - SD	X									
Spirit Lake Sioux Tribe - ND	P									
Paiute Bands - UT	P									
Crow Creek Sioux - SD	X									X
Sisseton-Wahpeton Sioux Tribe - SD	X			P						
Lower Brule - SD	X									
Region 9										
Agua Caliente Band - CA	X									
Augustine Band - CA	X									
Big Pine Tribe - CA	X									
Big Valley Band - CA	X									
Bishop Pauite Tribe - CA	X									
Campo Band of Kumeyaay Indians - CA	X		X	P						

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Colorado River Tribe - AZ	X	X								X
Coyote Valley Band of Pomo Indians- CA	X			P						
Fort Independence Tribe - CA	X									
Fort Mohave Tribe - AZ	X	X								X
Gila River Tribe - AZ	X									X
Hoopa Valley - CA	X		P	X		P				
Hopi Tribe - AZ	X									
Hopland Band of Pomo Indians - CA	X									
Hualapai Tribe - AZ	X		P							
Lone Pine Tribe - CA	X									
Morongo Band of Mission Indians - CA	X									
Manzanita - CA	X									
Navajo Nation - UT/AZ/NM	X				P		P	P		X
Pala Band - CA	X									
Pyramid Lake Paiute Tribe - NV	X									
Quechan Indian Tribe - AZ	X		P							X

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Round Valley Tribe - CA	X									
Rincon Band - CA	X		P							
San Pasqual -CA	P									
Twenty-Nine Palms Band - CA	X									
White Mountain Apache Tribe - AZ	X			X						
Yurok Tribe - CA	X									
Cabazon Band of Cahuilla Mission Indians - CA	X									
Shoshone Paiute Tribes of Duck Valley - NE/ID	X									
San Carlos Apache - AZ	X									
Karuk Tribe - CA	X									
Havasupai Tribe - AZ	P									
Yavapai Prescott Tribe - AZ	X									
Walker River - NV	X									
Pauma-Yuima Band - CA	X									
Cocopah - AZ	P									X
La Jolla - CA	X									

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Salt River Pima-Maricopa Indian Community - AZ	X									X
Fort McDowell Mohave - Apache Indian Community - AZ	X									
Saboba Band of Luiseno Mission Indians - CA	P									
Temecula Pechanga - CA	X									
Benton Paiute Utu Utu - CA	X									
Region 10										
Confederated Tribes of the Chehalis Reservation- WA	X			X						
Colville Tribe - WA	X		X							
Coeur d'Alene Tribe - ID	X	X								X
Grand Rhonde - OR	X									
Kalispel Tribe - WA	X									
Jamestown S'klallam - WA	X									
Lower Elwha Tribe - WA	X									
Lummi Tribe - WA	X			P			P			
Makah Tribe - WA	X									

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Muckleshoot Tribe - WA	X									
Nez Perce Tribe - ID	X	X								
Port Gamble Klallam Tribe - WA	X									
Puyallup Tribe - WA	X			X						
Quileute - WA	X									
Shoalwater Bay - WA	X									
Shoshone-Bannock Tribes - ID	X									X
Siletz - OR	X									
Skokomish Tribe - WA	X									
Spokane - WA	X			P						
Squaxin Island - WA	X									
Suquamish Tribe - WA	X									
Swinomish Tribe - WA	X									
Confederated Tribes and Bands of the Yakama Indian Nation - WA	X	X		P						
Umatilla Tribe - OR	X	X	X							

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Tulalip Tribes - WA	X	X		X						
Warm Springs - OR	X			P	P					
Klamath Tribe - OR	X	X								